A

LOW KIAN BOON & ANOR

v.

PP

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05-27-2009 (B)]

C

17 MARCH 2010

CRIMINAL LAW: *Penal Code - Section 302 - Appeal against conviction and sentence - Court of Appeal reinstated original s. 302 charge reversing conviction by High Court on lesser s. 304 charge - Whether issue of*

D

common intention given proper consideration by High Court - Whether Court of Appeal had justification for intervention

This was the appellants' appeal against the decision of the Court of Appeal, the summarised facts of which could be found in the

E

reported Court of Appeal decision of *PP v. Low Kian Boon & Anor* [2009] 4 CLJ 810 and the reported High Court decision of *PP v. Low Kian Boon & Ors* [2006] 3 CLJ 649. The appellants were originally charged for the offence of murder punishable under s. 302 of the Penal Code ('PC') but the High Court judge ('HC judge') convicted them on a lesser charge for the offence of culpable

F

homicide not amounting to murder punishable under s. 304 PC. There was no direct evidence linking the appellants to the offence and the prosecution case was based primarily on circumstantial evidence. The Court of Appeal ('CA') concurred with the findings on facts made by the HC judge on the appellants' purchase of the

G

murder weapon, the credibility and evidence of witnesses, and the rejection of the existence of a third person alleged by the defence but reinstated the original charge on the ground that the issue of common intention was not given proper consideration. The appellants now appealed before the Federal Court.

H

Held (dismissing the appeal and affirming convictions and sentences as per original charge punishable under s. 302 Penal Code)

Per Heliliah Mohd Yusof FCJ delivering the judgment of the

I

court:

(1) It was not for the Federal Court to construct or re-appreciate assiduously the facts of the case for it was noted that the HC

judge had undertaken that task. The question was whether the HC judge erred in his evaluation of the circumstantial evidence as opposed to the defence raised by the appellants. (para 24)

(2) There was no misdirection by the HC judge on the findings on facts as affirmed by the CA pertaining to the appellants' purchase of the murder weapon and the evidence of witnesses relating to events before the deceased was found. However, in respect of the issue on common intention, as rightly held by the CA, the HC judge attributed a defence to the appellants not advanced by either of them or warranted by the evidence before the court. The HC judge had entered into a series of conjectures unsupported by evidence and secondly, the issue of s. 34 PC was not properly considered. The HC judge could not draw inferences from matters which, materially, were his very own. It followed that the CA rightly pointed out that the appellants committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably supported the existence of a common intention. Although the authorities indicate that mere flight or absconding from the scene of the crime was insufficient to infer a guilty intention, nevertheless flight was the only circumstance relied upon in those cases. In the instant case, there were other facts and circumstances which must be taken together with the flight of the appellants from the scene of the crime. (paras 58, 62, 63 & 64)

(3) The HC judge ruled that the evidence adduced by the prosecution led to the inference that the appellants were in the house. The HC judge also accepted the evidence of SP17, SP18, SP23 and the unchallenged findings on the DNA. However, on the issue of common intention and intention pursuant to s. 300 PC, his own inferences on what could not have been the intention of the appellants were not found in evidence. (para 68)

(4) All the ingredients of an offence under s. 302 were established. There was misdirection on facts and law when the HC judge held that a lesser offence was instead committed. That warranted appellate intervention and the CA had shown justification for it. (para 69)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Rayuan, fakta berkenaan mana dapat dilihat di dalam kes Mahkamah Rayuan yang dilaporkan *PP v. Low Kian Boon & Anor* B [2009] 4 CLJ 810 dan kes Mahkamah Tinggi yang dilaporkan *PP v. Low Kian Boon & Ors* [2006] 3 CLJ 649. Perayu-perayu asalnya dituduh dengan kesalahan bunuh di bawah s. 302 Kanun Keseksaan ('KK'), namun begitu, hakim Mahkamah Tinggi ('hakim MT') telah mensabitkan mereka atas kesalahan lebih ringan mematikan C orang tidak sampai membunuh di bawah s. 304 KK. Tidak wujud keterangan terus yang mengaitkan perayu-perayu dengan kesalahan dan pendakwaan secara pentingnya bergantung kepada keterangan ikut keadaan. Mahkamah Rayuan ('MR') bersetuju dengan dapatan-dapatan fakta yang dibuat oleh hakim MT berkaitan pembelian D senjata yang digunakan untuk membunuh, berkaitan kredibiliti dan keterangan saksi-saksi, serta tentang penolakan kewujudan orang ketiga seperti yang didakwa oleh pembelaan, tetapi telah mengekalkan pertuduhan asal atas alasan isu niat bersama telah tidak diberikan penilaian yang sewajarnya. Perayu-perayu merayu ke E Mahkamah Persekutuan.

Diputuskan (menolak rayuan and mengesahkan sabitan dan hukuman-hukuman seperti di pertuduhan asal yang boleh dihukum di bawah s. 302 Kanun Keseksaan)
F **Oleh Heliliah Mohd Yusof HMP menyampaikan penghakiman mahkamah:**

(1) Bukanlah tugas Mahkamah Persekutuan untuk melakarkan atau menilai kembali fakta-fakta secara teliti memandangkan itu sudah pun dibuat oleh hakim MT. Persoalannya adalah sama G ada hakim MT khilaf dalam membuat penilaian terhadap keterangan ikut keadaan dan bukan terhadap pembelaan yang dibangkitkan oleh perayu-perayu.

(2) Sepertimana yang disahkan oleh MR, tidak terdapat sebarang H salah arahan di pihak hakim MT berkaitan dapatan-dapatan yang dibuat beliau berkaitan dengan pembelian senjata yang digunakan untuk membunuh oleh perayu-perayu, dan keterangan saksi-saksi berhubung dengan peristiwa-peristiwa sebelum jasadnya ditemui. Bagaimanapun, berhubung isu niat I bersama, sepertimana yang diputuskan dengan betulnya oleh

MR, hakim MT telah atributkan kepada perayu-perayu suatu pembelaan yang tidak pernah dibangkitkan oleh kedua-duanya atau diwajarkan oleh keterangan-keterangan yang ada di hadapan mahkamah. Hakim MT telah membuat beberapa agakan yang tidak disokong oleh keterangan, dan keduanya, isu di bawah s. 34 KK telah tidak dipertimbang dengan sewajarnya. Hakim MT tidak boleh membuat andaian-andaian daripada hal-hal yang, secara materialnya, datang dari beliau sendiri. Ianya mengikut bahawa MR telah dengan betulnya menyatakan bahawa perayu-perayu telah melakukan kesalahan bunuh dengan niat bersama. Kehadiran bersama mereka di tempat kejadian dan keterlibatan mereka yang boleh dianggapkan dari kecederaan-kecederaan yang dikenakan terhadap si mati ditambah dengan perbuatan melarikan diri dari tempat kejadian, dengan munasabahnya menyokong kewujudan niat bersama. Walaupun autoriti-autoriti menunjukkan bahawa meninggalkan atau melarikan diri semata-mata dari lokasi jenayah tidak mencukupi untuk mengandaikan suatu niat jenayah, namun, melarikan diri adalah satu-satunya halkeadaan yang menjadi pergantungan dalam kes-kes tersebut. Dalam kes semasa, terdapat fakta-fakta dan halkeadaan-halkeadaan lain yang boleh diambil kira bersama-sama dengan perbuatan melarikan diri oleh perayu-perayu dari tempat kejadian.

(3) Hakim MT memutuskan bahawa keterangan yang dikemukakan oleh pendakwaan telah membawa kepada inferens bahawa perayu-perayu berada di dalam rumah. Hakim MT juga menerima keterangan SP17, SP18, SP23 serta dapatan-dapatan tidak dicabar berhubung dengan DNA. Bagaimanapun, berkaitan isu niat bersama dan niat di bawah s. 300 KK, inferens-inferens beliau sendiri mengenai apa yang tidak menjadi niat perayu-perayu tidak dapat dijumpai di dalam keterangan.

(4) Kesemua ingredien-ingredien kesalahan di bawah s. 302 telah dibuktikan. Terdapat salah arahan di sisi fakta dan undang-undang bilamana hakim MT memutuskan bahawa satu kesalahan yang lebih ringan telah sebaliknya dilakukan. Itu mewajarkan campurtangan peringkat rayuan dan MR telah menunjukkan justifikasi baginya.

Case(s) referred to:

Abdullah Zawawi v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
AEG Carapiet v. AY Derderian [1961] Cal 359 ***(refd)***
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Bear Island Foundation v. AG for Ontario 83 DLR (4th) 381 ***(refd)***
Caldeira v. Gray [1936] MLJ 137 ***(refd)***
Chua Beow Huat v. PP [1968] 1 LNS 24 HC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Dorai Pandian Munian & Anor v. PP [2009] 1 LNS 234 CA ***(refd)***
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Jagrup Singh v. The State of Haryana AIR [1981] SC 1552 ***(refd)***
Jai Prakash v. State (Delhi Administration) [1991] AIR SCW 654 ***(refd)***
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Mahbub Shah v. Emperor AIR [1945] PC 118 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC ***(refd)***
PP v. Wong Wai Hung & Anor [1993] 1 SLR 927 ***(refd)***
Ram Avtar v. The State (Delhi Administration) AIR [1985] SC 1692 ***(refd)***
Sereekanlal Ramayya Munipalli v. State of Bombay AIR [1955] SC 287 ***(refd)***
Shaiful Edham Adam & Anor v. PP [1999] 2 SCR 57 ***(refd)***
Tan Hung Thiam & Anor v. PP [1991] 1 LNS 63 CA ***(refd)***
Udaipal Singh v. State of Uttar Pradesh AIR [1972] SC 54 ***(refd)***
Virsa Singh v. State AIR [1958] SC 465 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 21, 90A, 114(g)
Penal Code, ss. 34, 300, 302, 304(b)

For the 1st appellant - Edmund Bon (Raymond Yap & Joanne Leong with him); M/s David Kok & Partners
For the 2nd appellant - Dato' Muhammad Shafee Abdullah (Sarah Abishegam with him); M/s Shafee & Co
For the PP - Ahmad Bache DPP

[Editor's note: For the Court of Appeal and High Court judgments, please see PP v. Low Kian Boon & Anor [2009] 4 CLJ 810 and PP v. Low Kian Boon & Ors [2006] 3 CLJ 649 respectively.]

Reported by Usha Thiagarajah

JUDGMENT

Heliliah Mohd Yusof FCJ:

[1] The appellants Low Kian Boon (or 1st appellant) and Tan Pei Yan (or 2nd appellant) appealed against the decision of the Court of Appeal (COA) rendered on 4 April 2009. The decision was the outcome of cross-appeals lodged by the Public Prosecutor as well as the two appellants against the decision of the High Court (HC) judge of 25 April 2006 whereby both the appellants were convicted under s. 304(b) Penal Code (PC) and sentenced to imprisonment for a period of ten years to take effect from their dates of arrests.

[2] While the appellants appealed against the period of sentence of imprisonment the Public Prosecutor's appeal was against conviction and sentence as the charge as originally made against both the appellants was framed pursuant to s. 302 PC. The HC judge has substituted for a conviction under s. 302 the conviction under s. 304(b). The COA on appeal reversed the decision of the HC and reinstated a conviction pursuant to s. 302, that is under the original charge. Hence the appeal before us.

[3] The judgments of the HC and the COA have traced in detail the facts of the prosecution's case (pp. 2702-2705 RR Vol. 2(7) RHC judgment of HC). We do not find the need to repeat. However for the purposes of dealing with the complaints raised in the appeal before us the core details require mention. The deceased at the material time was found dead at the bottom of the staircase leading to the ground floor of his dwelling house. The deceased had succumbed to injuries as he was found with 23 slash wounds on his body including one at the base of his neck. The persons who were also in the house at that time are his wife PW20 and one of his two stepdaughters KSK. The two stepdaughters KSK and KSY are PW20's daughters by a previous marriage.

[4] A parang (exh. P22) was recovered following investigations by the police in a room belonging to KSY. Evidence was led by the prosecution that purchase of the parang (exh. P22) was made by the appellants. The police investigations resulted in four persons being charged under s. 302 PC read with s. 34 PC, namely the appellants, KSK and KSY. At the close of the case for the prosecution KSK and KSY were acquitted while the 1st and 2nd appellants were directed to enter upon their defence which they did on oath.

[5] The evidence relied upon by the prosecution in this case was primarily circumstantial. The complaints raised in this appeal rest on the following principal issues (1) findings on facts and (2) common intention and the findings on common intention. It is contended in principle that there are gaps in the facts led by the prosecution such that the prosecution has in effect failed to establish the *actus reus* in relation to the appellants. This in turn evolves mainly on the fact that the evidence linking the presence of the appellants to the dwelling house where the assailants inflicted the fatal injuries are indirect and mostly inferential in nature. And closely intertwined with this is the alleged paucity of evidence to provide the common intention between the appellants since reliance is emplaced on s. 34 PC. We would like to refer to the findings of the HC and COA on those issues and state our views thereon in the course of the issues being dealt with in this appeal.

The First Principal Issue: Findings Of Facts

[6] The HC in the grounds of judgment evaluated the following:

PW20 the spouse of the deceased who was present in the house did not identify the person or persons who purportedly were seen by her. The other person who was in the house that is her daughter KSK who was charged together with the appellants could not be relied upon by the prosecution. Hence reliance was emplaced on the evidence of several other witnesses whose evidence have also been challenged. It is found necessary to deal with the evidence brought forth by the witnesses in the following sequence that is (a) evidence relating to the purchase of the weapon used; (b) evidence of witnesses relating to the appellants.

(a) The Purchase Of The Weapon Identified exh. 22

The evidence of SP5 indicates a positive identification of the purchase of the exh. 22 by two persons namely the two appellants. SP5 also identified the same two appellants at the identification parade conducted by the police. The evidence of SP5 remained unshaken in so far as this part of the evidence is adduced by the prosecution. SP6's evidence also established the same two appellants to be the persons purchasing two parangs. There is a slight inconsistence detected in his evidence relating to the identification parade where it is said during cross-examination that a person was identified but that person is nowhere present in court and thereby

suggesting the possibility that there was a third person. But no further evidence was led on this particular aspect. It is noted however that the learned trial judge did not really address this particular detail in his grounds but the question whether this omission is fatal or otherwise will be discussed again in this judgment.

(b) The Evidence Of Witnesses Relating To Events Before The Deceased Was Found And Evidence Of Other Witnesses

The direct evidence to note here is the evidence of SP8 who with another person whose name is Sathiya on 11 November 2003 at about 11pm were on their way to meet KSK at the house of the deceased as it was alleged that KSK wanted to "curi keluar". KSK did not join SP8 and her companion but her sister KSY did and the three proceeded to a shop to have tea. The salient part of her evidence accepted by the trial judge are found in p. 2724 RR Vol 2(7) where SP8 testified, *inter alia*,: "Saya boleh cam lelaki tersebut kerana saya ada nampak wajahnya semasa beliau bercakap dengan Sue Yin" Sue Yin is KSY. Having considered the evidence of SP8 the HC judge ruled:

> From the evidence of SP8, it is beyond dispute that at about 11.30pm, on 11/11/03, the 1st accused was near the house of the victim and had jumped into the compound of the house of the victim. The dock identification of the 1st accused by SP8, as well as at the identification parade, puts to rest any dispute about the identity of the male person who hugged Sue Yin and talked to Sue Yin near the victim's house when Sue Yin, SP8 and Sathiya were proceeding from the back of the house to the shop nearby to have drinks, notwithstanding Sue Yin's apparent reluctance to give SP8 any particulars as to the identity of the person she had met and talked with.

Further support of the evidence of SP8 is found in the evidence of SP13 who after receiving a call from KSY at about 12.10am on 12 November 2003 went to a restaurant in his car to meet KSY, SP8 and Sathiya. SP13 also gave the evidence that while seated there and talking he heard a voice crying out for help coming from the vicinity of KSY's house but he could not ascertain whether it was a voice of a male or female. At that point of time KSY had suggested rather hurriedly that they should leave the restaurant.

[7] The abovementioned details relate to the finding of facts of the presence of the 1st appellant in the vicinity of the dwelling house where the deceased was found with the fatal injuries. Consideration has to be given next, to evidence relating to the 2nd appellant and the link between 1st and 2nd appellants. The witnesses the prosecution relied upon include SP17. SP17 knows a friend by the name Dexter, the 2nd appellant. Through the 2nd appellant SP17 became casually acquainted with the 1st appellant. On the material date 12 November 2003 at about 12.30am while having tea with two others, that is SP19 and SP18, there was a call received by mobile phone whereby SP17 spoke to the 2nd appellant. Through that conversation SP17 understood that the 2nd appellant had a problem and he also requested to be fetched from a certain place indicated. Together with SP18, SP19, SP17 went to fetch the 2nd appellant at a Shell station from which both appellants emerged to join them in the motor car driven by SP19. The HC judge dealt with the evidence of SP17 in lengthy details. It is clear that reliance is emplaced upon the evidence given by SP17 to establish that the 2nd appellant has a nexus with the events that took place in the dwelling house of the deceased. The evidence of SP17 was referred to verbatim in the grounds of judgment of the HC judge. For the purposes of this appeal the most pertinent portions are as follows:

> ... Melalui telefon bimbit saya menanya Dexter dimana beliau berada. Dia kata dia berada di stesen minyak Shell tetapi kami masih tidak dapat carinya dan lepas itu saya nampak Dexter keluar daripada stesen minyak Shell. Saya tidak nampak dari mana beliau keluar sebab waktu itu sangat gelap. Dia berlari kearah kereta Ah Kok. Lepas itu dia pun menaiki kereta Ah Kok.
>
> Semasa saya nampak Dexter beliau ada dengan seorang lagi. Orang itu juga berlari ke arah kereta Ah Kok. Orang itu juga menaiki kereta Ah Kok. Mereka masuk ke dalam bahagian belakang kereta Ah Kok. Pada masa itu saya ada di bahagian belakang kereta Ah Kok.
>
> Saya pernah lihat orang yang masuk bersama-sama Dexter, sebelum hari itu. Saya kenal orang itu. Orang itu bernama Jimmy. Sebelum 12/11/03 saya pernah lihat Jimmy tetapi tidak berapa kenal dia. Saya pernah lihat beliau lebih dari 3 atau 4 kali. Saya hanya ada menegur beliau "Hello".
>
> Jimmy adalah kawan Dexter. Saya boleh cam Jimmy. Beliau ada di Mahkamah hari ini (OKT1 dicamkan).

Dalam kereta saya duduk di paling kiri sekali bahagian belakang. Dexter duduk di bahagian tengah, manakala Jimmy duduk di sebelah kanan. Mereka duduk sahaja dalam kereta. Kereta itu pun bertolak dari stesen minyak Shell ke rumah saya. Dexter kata ada hal nak berkata dan hendak berkata di rumah saya. Rumah saya jauhnya lebihkurang 15 minit dari stesen minyak Shell.

Dalam tempoh perjalanan ke rumah saya, saya telah menanya Dexter apakah halnya. Dexter memberitahu saya ia bersama-sama dengan Jimmy pergi memukul orang. Lepas itu kami pun sampai di rumah saya.

Semasa saya masih dalam kereta saya telah menanyakan Dexter. "Siapakah orang ia pukul?". Dia kata bapa orang. Saya tidak tanya beliau apa-apa lagi.

Rumah saya berada di SS 17. Semasa dalam rumah saya Dexter pun telah mandi di rumah saya dan pakaiannya kotor seperti ada darah. Darah itu dibaju Dexter. Saya tidak boleh ingat baju yang dipakai oleh Dexter hari itu pada awal pagi sebelum dia mandi. Selepas Dexter mandi dia tidak memakai baju yang sama. Selepas mandi dia memakai baju saya. Dia ada pakai seluar malam itu – seluar panjang sebelum mandi. Saya tidak ingat warna seluar panjang itu. Selepas mandi dia tidak pakai seluar yang sama. Selepas mandi saya tidak tahu dia pakai seluar siapa.

Saya tidak tahu pakaian yang sebelum Dexter mandi itu diletak dimana oleh Dexter.

...

Saya tidak ingat samada Dexter dan Jimmy ada memakai kasut sebelum masuk ke dalam rumah saya.

Setelah Dexter masuk ke dalam rumah saya, dia duduk sebentar, saya berikan dia tuala dan dia pun pergi mandi. Saya memberi tuala kepada Dexter kerana Dexter kata dia hendak mandi kerana pakaiannya kotor dan dia pun minta tuala daripada saya.

...

Selepas Dexter habis mandi dia telah duduk atas sofa bersama saya. Semasa itu saya ada bercakap dengan Dexter. Saya bercakap pasal hal tadi. "Hal tadi" bermaksud hal "pukul memukul" tadi.

A Saya tanyakan Dexter "Apakah hal tadi?" Dia kata dia bersama-sama dengan Jimmy memukul bapa orang. Saya telah tanya bila dan mana mereka memukul bapa orang. Dia kata pada waktu kami menjemputnya di stesen minyak Shell, dan Dexter juga telah memberitahu saya mereka telah memukul orang di rumah sahabat wanita Jimmy. Dexter kata selepas memukul orang dia pun telah menelefon Ah Boon – iaitu pada masa kami sedang minum teh. Saya telah tanya Dexter apakah maksud "memukul orang". Dia kata dia bersama-sama Jimmy telah memukul orang dan mungkin secara tidak sengaja telah menyebabkan kematian. Saya telah menanyakan dia, apakah senjata yang digunakannya. Dia kata, "pisau". Semasa Dexter bercakap sama saya, Jimmy tidak bercakap apa-apa.

…

Sebelum ini saya tidak pernah bergaduh dengan Jimmy atau Dexter.

Pada hari itu (12/11/2003) sewaktu saya berjumpa dengan Jimmy di Shell station dan sehingga saya hantar dia ke kedai kopi di Sunway, saya nampak Jimmy pakai baju T-shirt. Saya tak ingat warnanya. Dia memakai seluar jeans – saya tak ingat warnanya.

Jimmy tidak mandi di rumah saya pada hari tersebut. Dia juga tidak salin pakaiannya di rumah saya.

[8] The evidence of SP18 was detailed by the HC judge as follows:

SP18, Ng Hon Boon testified that on 12/11/03 at about 12.30 am he was at Sunway Mentari, together with Ah Kok (Lim Sein Lock, SP19), Wong Wing Hing (SP17) and Chee Leng (Pang Tze Ling, DW4) having tea. While all 4 of them were having tea, SP18 received a telephone call from Dexter, who was trying to contact Wing Hing. SP18 handed his phone over to Wing Hing for Dexter to talk to him. Wing Hing then requested Ah Kok to take them to search for Dexter. They sent Tze Ling back to her house and then went to Shell petrol station at USJ 1 to wait for Dexter.

SP18 testified that, while they were waiting in the car at the petrol station, Dexter came running towards the car together with another male person. He identified this male person as the 1st accused. They both entered into the rear of the car. Dexter looked frightened. After entering the car Dexter said he had killed a person. They proceeded to Wing Hing's house. SP18 testified at Wing Hing's house he slept in the living room but, before he slept, he overheard Dexter telling Wing Hing, that he, together with Jimmy, had killed the father of some person.

SP18 testified that, on the way to Wing Hing's house from the Shell petrol station, he had seen the clothes worn by Dexter and Jimmy. He testified that he saw blood marks on the shirt of Dexter and Jimmy.

Under examination-in-chief SP18 testified, *inter alia*:

> Saya ada nampak pakaian Dexter dan Jimmy sewaktu balik ke rumah Wing Hing dari stesen minyak Shell. Dexter pakai T-shirt. Saya tidak ingat warna T-shirt tersebut. Dia memakai seluar jeans berwarna biru gelap. Saya nampak kesan darah pada pakaian Dexter – iaitu diatas T-shirt. Buat kali pertama saya nampak T-shirt Dexter mempunyai darah semasa kami berada di stesen minyak Shell USJ 1.
>
> Semasa Dexter sampai di rumah Wing Hing, Wing Hing telah memberi sehelai baju kepada Dexter untuk tukar.
>
> Saya juga ada nampak pakaian Jimmy sewaktu di stesen minyak Shell. Jimmy memakai sehelai T-shirt tetapi saya tidak ingat warnanya. Beliau memakai sehelai seluar panjang dan saya juga tidak ingat warnanya. T-shirt Jimmy juga mempunyai kesan darah. Pada hari itu Jimmy ada pakai cermin mata.
>
> ...
>
> Selama saya berkenalan dengan Dexter saya tidak bermusuh dengan beliau. Saya juga tidak bermusuh dengan Jimmy.

[9] SP28 who performed the post-mortem testified that the deceased had 23 injuries on his body almost all of them confined to the upper part of the body. Injury No. 11 was a gaping deep incised wound 17 cm long placed horizontally on the upper back of neck and his wound had cut the underlying 2nd and 3rd crucial vertebrae and also the spinal cord completely cut. Injury No. 11 by itself could lead to death and also the other injuries that were found could have collectively caused the death. Injury No. 11 is necessarily a fatal injury and the rest are fatal in the ordinary course of nature. According to SP28 all the cut wounds were caused by a sharp-cutting, long-bladed weapon and in his opinion, a classical weapon of that nature would be a parang. Exhibit P22 was shown to him and he testified that it is a very heavy, sharp, long, straight bladed weapon and is a weapon likely to have caused all the injuries on the deceased. SP28 also testified that the cause of death is multiple cut wound to head and neck.

[10] Since one of the major complaints raised in this appeal is against the findings of facts, the statements of the HC judge that a case has been established against both appellants are quoted *verbatim*:

> At the close of the prosecution's case, upon a careful examination of all the evidence produced by the prosecution and the evaluation of the credibility of the witnesses, notwithstanding some apparent inconsistency in the evidence of some witnesses in the narration of events, their observation or non observation as to time or other details, which might be considered relevant by one party but not by another (depending on whether such evidence is considered in isolation or in the context of the totality of other evidence touching on the issue, I find the following as established beyond reasonable doubt:
>
> 1) that on 11/11/03, the deceased, together with his wife (SP20) and her 2 daughters (the 2nd and 3rd child), had dinner together as a family in their house No. 30 Jalan USJ 1/4E between 7.00 pm and 8.00 pm;
>
> 2) that 2nd and 3rd child went to bed upstairs at about 10.00 pm. Each occupied a separate room on their own;
>
> 3) that the deceased and his wife were watching TV downstairs after dinner. At about 11.00 pm there was a phone call on the house-phone downstairs. The deceased answered the phone but, there was no response from the other end by the caller;
>
> 4) the deceased and his wife went upstairs to sleep in the master bedroom, at about 11.00 pm;
>
> 5) the landing light was not switched off;
>
> 6) the 2nd child (Ku Sue Yin) made a telephone call to Chen Boon Chin (SP13) at about 12.10 am, on 12/11/03 from her house, inviting him to meet her to have a drink at a restaurant, very close to her house; SP13 accepted the invitation and proceeded in his car to the restaurant from his house;
>
> 7) the 2nd child climbed out of the window of her room hurriedly immediately after her call to SP13; (the only reasonable inference from the evidence of SP13 with regard to the time of the call from the 2nd child and, the evidence of SP20 that there was a knock on her bedroom door at about 12.00 midnight);

8) the 1st accused was in the vicinity of the deceased's house at about 12.00 midnight, as he was met by the 2nd child while walking from the back-lane of the house to the restaurant nearby, to meet SP13;

9) the 3rd child (Ku Sue Kin) did not leave the house, after going to bed on 11/11/03, as planned with Foong Mae Sze (SP8), who had came to meet her at the back-lane of the house between 11.00 pm (11/11/03 and 12.10 am (12/11/03);

10) that there was a knock on the bedroom door of the deceased and his wife at about 12.00 midnight, on 11/11/03;

11) that the deceased's wife (SP20) got up and went to the door but, there was nobody at the door;

12) that the staircase light was on;

13) that SP20 went to the 2nd child's room to check whether she was okay and, she opened the door of the child's room slowly, the light in the room was not switched on; suddenly, a guy attacked her from inside the room using some weapon; she became scared and closed the door; she opened the door a second time to check if her daughter was in the room; she heard somebody hide behind the room door; she closed the door and ran to her bedroom;

14) that the deceased got up and asked SP20 what was happening; SP20 told him a guy attacked her in Ku Sue Yin's room; she told him he had used a weapon;

15) that SP20 told the deceased not to go to Sue Yin's room;

16) that the deceased rushed to Ku Sue Yin's room; SP20 did not follow the deceased but, remained in her bedroom;

17) SP20 heard the deceased crying in pain;

18) that the deceased came back to the master bedroom;

19) that SP20 saw deceased's face had been slashed; the deceased picked up a T-shirt, asked SP20 to get help, and ran downstairs;

20) that SP20 remained in her bedroom and closed the door;

21) that SP20 had opened the door and saw a guy running downstairs; that it was not the same guy she saw the first time she opened Ku Sue Yin's room door;

22) that the guy had realized SP20 had looked at him because she was at her room door;

23) that the guy then came back, up the stairs; SP20 closed her bedroom door and locked herself inside; she then shouted for help from the window, she was in her room for about 10 minutes and then Ku Sue Kin (3rd child) called for her at her room door;

24) that SP20 opened the room door, and asked Ku Sue Kin where she was, before this;

25) that Ku Sue Kin told her that she was sleeping in her room;

26) that SP20 asked Ku Sue Kin for her father's whereabouts; she replied she did not know;

27) that Ku Sue Kin was standing outside SP20's door when SP20 first saw her;

28) that SP20 and Ku Sue Kin ran downstairs and saw the deceased lying on the floor, in a pool of blood;

29) that on 12/11/03, police found a blood stained parang (P22) on the ledge of the window of Ku Sue Yin's bedroom;

30) that on the bed, Ku Sue Yin's room, was found a blood stained sheath of a parang (P24);

31) that the cause of death of the deceased was "multiple cut wound to head and neck";

32) that P22 is a very heavy, sharp, long, straight-bladed weapon and, is a weapon likely to have caused all the injuries found on the deceased;

33) that the blood stains, on the parang (P22) and sheath (P24), were that of the deceased;

34) that on 12/11/03, between 12.00 am and 1.00 pm, Wong Wing Hing received a call from Dexter, the 4th child, requesting him to search for him in the vicinity of Permai as he was faced with a problem;

35) that SP17 (Wong Wing Hing), SP18 (Ng Hon Boon) and SP19 (Lim Sein Lock) went to a Shell station at Subang Permai in "search" of Dexter;

36) that at the Shell station, Dexter and the 1st accused (Jimmy) came running from behind the Shell station and entered the back of SP19's car;

37) that SP18 saw blood marks, on the T-shirt of Dexter and Jimmy, while they were at the Shell station, when he turned his head and looked at the back of the car for about 10 seconds, upon Dexter and Jimmy entering the back of the car;

38) that from the Shell station, Dexter and Jimmy went to SP17's house, arriving at about 1.00 am, on 12/11/03, in the car driven by SP19;

39) that at the house of SP17, Dexter had a bath and a change of shirt; Dexter wore a shirt of SP17 after his bath; that SP17 observed the shirt worn by Dexter, before his bath, appeared to be dirty, as if stained in blood; that SP17 did not know where Dexter had placed the clothes he had worn, prior to his bath;

40) that the T-shirt (P30) was seized from 1st accused's house on 15/11/03, the day of his arrest;

41) that the T-shirt (P30) had blood stains which blood stains were that of the deceased;

42) that the dog "DUKE", from the dog unit, had traced the scent of a person or persons from the back of the house of the deceased, along a route that led to a Shell petrol station, about 1000 meters away;

In the circumstances, there was incontrovertible evidence that 1st accused and 4th child were in the vicinity of the deceased's house, between 12.10 am and 12.30 am, on 12/11/03, because 1st accused was seen by SP8 and, thereafter, 1st accused and 4th child were picked up from the Shell station (which was about 1000 meters from the house of the deceased) by SP17, together with SP18 and SP19, in the car driven by SP19.

Since blood stains were seen on the shirts of the 1st accused and 4th child, by SP18, when both of them entered the back of the car, coupled with the undisputed fact that the 4th child had changed his shirt (which was blood stained and dirty) and the recovery of a shirt, which had the deceased's blood stains on it, at the flat of the 1st accused, on 15/11/03, there was strong circumstantial evidence to incriminate them with the offence charged. There has to be a satisfactory explanation as to how and why the blood stains were found on their shirts.

[11] *(Paragraph 11 removed upon judge's instructions.)*

[12] Wong Wing Hing is SP17. The HC judge relied on the remarks made by 2nd appellant to SP17. Those remarks are again mentioned in the judgment of COA as evidence that are to be taken into account under s. 21 of the Evidence Act 1950 (Act 1950). This aspect will be reverted to later in this judgment.

The Defence

[13] The trial judge referred to the defence as a "denial". Both appellants have similar versions in their defence. Generally the culpability for the fatal injuries suffered by the deceased is attributed to a third person referred to as Ivan and described as a gangster. The 1st appellant asserted that he had accompanied Ivan in order to lend assistance to Ivan. It was alleged that Ivan intended to facilitate a friend, that is KSK, to escape from the house apparently from the clutches of her step father. The 1st appellant in his version claimed that he, the 2nd appellant and Ivan proceeded to the deceased's house in a taxi but before reaching there, the three of them alighted and Dexter (the 2nd appellant) was told to wait at Shell petrol station which according to the evidence of P23 is about 1-1 1/2 km away from the house. According to the 1st appellant's version Ivan had preceded him while he went to a restaurant (50 meters away). The 1st appellant conceded that he was in the vicinity of the house, and entered the compound, (the front of the house) and that he was surprised that he encountered KSY on the way to the house. According to the 1st appellant neither Ivan nor KSK emerged. Instead he heard a scream that caused him to take flight to the Shell petrol station where he met the 2nd appellant again. The latter made a phone call to a friend after which a motorcar with three persons inside did arrive (namely SP17, SP18, SP19).

[14] The 2nd appellant gave the same version with the difference that he was waiting at the Shell petrol station until the 1st appellant came without the person named Ivan. Both the 1st appellant and 2nd appellant testified that it was Ivan who had stopped at the Hardware Do It Yourself shop to purchase two parangs and that Ivan paid for the purchases.

The Concurrent Findings Of The COA On The Facts

[15] The COA stated that the court accepted as "entirely correct" the findings of the HC judge "based on the proved facts before the learned judge". It is observed that the facts mentioned by the COA in the grounds of judgment are found in para. 4 of that judgment:

> 4. The evidence upon which the public prosecutor relies in support of his appeal is as follows. First, the nature of the injuries suffered by the deceased. These are such as to point to an intention to kill on the part of those who inflicted them. Second, the other evidence which the public prosecutor says irresistibly points to the 1st accused and the 4th child as being the assailants who inflicted the wounds on the deceased. In the first place, there is evidence that the 1st accused and the 4th child purchased two parangs from PW5 and PW6. One of the parangs is Exh. P22. In the second place, there is the evidence of PW17 and PW18. In a gist, this is what the two witnesses said. At a little past midnight, PW18 received a telephone call on his mobile from the 4th child asking to be picked up from a Shell petrol station at USJ. PW17 and PW18 went along. On arrival, the 1st accused and the 4th child emerged from the petrol station and entered the car. PW19 was driving it. Both PW17 and PW18 noticed that the clothing of the 1st accused and the 4th child was blood stained. Also, the 4th child appeared to be in a state of shock. While in the car, the 4th child informed PW17 and PW18 that he and the 1st accused had hit someone's father. All those in the car then proceeded to PW17's home where the 4th child had a shower and changed his clothes. PW17 then asked him what had happened. In response, the 4th child said that he and the 1st accused had killed someone but with no intention to cause death. These statements, submits the learned deputy who argued the appeal before us are admissible as admissions under s. 21 of the Evidence Act 1950. In the third place, there is the blood stained clothing later recovered by the police during investigation which carried the blood of the deceased as established by DNA testing. A similar test was conducted on the blood stain found on Exh. P22 which established that that weapon carried the deceased's blood. In the fourth place, there is evidence showing that the police party who arrived at the scene of the crime had used a tracker dog which had led them from the deceased's house to the very Shell station where PW17 and PW18 had picked up the 1st accused and the 4th child. Lastly, there is evidence to show that the 1st accused was seen in the compound of the deceased's house at about the time the crime was committed.

[16] The subject of circumstantial evidence has been given detailed attention in *Public Prosecutor v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609. In the judgment of Visu Sinnadurai J (as he then was), I find the following relevant:

Law on circumstantial evidence

Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.

The law on circumstantial evidence is stated by the learned editors of *Blackstone's Criminal Practice 1991* at pp 1674-1675 as follows:

> Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

The learned editors point out further:

> Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (*Director of Public Prosecutions v. Kilbourne* [1973] AC 729, per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:
>
> > One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus, it may be in circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (*Exall* [1866] 4 F & F 922 at p 929).

However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:

> It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v. The Queen* [1952] AC 480, per Lord Normand at p 489).

Nonetheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v. Director of Public Prosecutions* [1973] 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

> ... to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, ... in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt (per Suffian LP in *Jayaraman & Ors v. PP* [1982] 2 MLJ 306 at p 310).

...

Similarly Mohd Azmi SCJ (as he then was) in *Ng Thian Soong v. PP* [1990] 2 MLJ 148 observed (at p 151):

> It must be noted at this point since *Jayaraman & Ors v. PP* [1982] 2 MLJ 306, the then Federal Court had applied *McGreevy v. Director of Public Prosecution* [1973] 1 WLR 276, by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt.

A

> Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt.

B

His Lordship then added at p 151:

> But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inference that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.

C

Though some of these observations were made in cases where the trial was with a jury, they are equally applicable with the necessary modifications to a trial conducted by a judge sitting alone without a jury, as I do in the present case.

D

Inferences from circumstantial evidence

In determining the proper inference to be drawn from circumstantial evidence, the Supreme Court in *Ng Thian Soong v. PP, supra* pointed out as follows (at p 150):

E

> ... Where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at as to the guilt of the accused.

F

G

His Lordship then concluded (at p 150):

H

> Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

I

His Lordship pointed out that it was the duty of the trial judge to make a balanced consideration of other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they were equally favourable to the accused. A

Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy. In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment. B

It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence. C

[17] At this stage it is also opportune to mention the principles governing appellate intervention, particularly, where in this appeal before us there are concurrent findings on facts bearing in mind that the conviction has been sustained on circumstantial evidence. D

[18] In the Malaysian context the much publicised case of *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, affords a reminder that has been extolled in the judicial statements of the Federal Court, namely, when the credibility of witnesses are being evaluated the functions of an appellate court, in dealing with a question of fact in which questions of credibility are involved, are limited in their character and scope. In this instant appeal, there are found expressions by the HC judge of his opinion of witnesses whom he has seen and as an appellate court in order to reverse that, this court must be convinced that the trial judge is wrong. E F

[19] The following are some of the judicial decision that reflect the ambit of the powers of an appellate court to interfere with the findings of a trial court. The case of *Caldeira v. Gray* [1936] MLJ 137, 138, could first be mentioned. The Privy Council held: G

... that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong. H I

[20] The Federal Court cited this passage in *Dato Mokhtar bin Hashim v. PP, supra*. It is also not part of the function of an appellate court to make its own finding of fact. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, The Federal Court held, (per Gopal Sri Ram, then JCA):

> Now, it settled law that it is no part of the function of an appellate court in a criminal case or indeed any case-to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

[21] There must be overriding error in the assessment of the facts or there are blatant errors committed in coming to such findings. In *Bear Island Foundation v. A.G for Ontario* 83 DLR (4th) 381, the Supreme Court of Canada held:

> This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts.

[22] In *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1, the Federal Court mentioned the aforesaid passage. And in a more recent case *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603, the Federal Court held, (per Richard Malanjum CJ (Sabah & Sarawak)) observed:

> But we take note that in these appeals there had been concurrent findings of fact both by the trial High Court and the Court of Appeal. Thus, as the final appellate court we should be slow in interfering with such findings unless there are blatant errors committed in coming to such findings. (See: *Loh Shak Mow v. PP & Wong Hoi Ping, Alan v. PP* [1986] 1 LNS 47 (also [1986] SLR 358); *Broadhurst v. The Queen* (PC) [1964] 2 WLR 44.

[23] Before considering the next major issue on the element of common intention and decisions of the HC and COA thereon, it is pertinent to elaborate further on the complaints raised by learned counsel for the two appellants. Owing to the similarities in the defence raised by both appellants it is found appropriate to summarise the issues raised by both learned counsel for the appellants as follows:

(a) credibility of witnesses as there are discrepancies in the evidence of the witnesses for the prosecution. A

(b) material flaws:

(i) Exhibit 30, the t-shirt and exh. 51 for the identification of the parang. B

(ii) alleged infirmities such as the conduct of the identification parade and the failure to call several other witnesses.

(iii) alleged presence of an unidentified third individual (Ivan). C

[24] Bearing in mind the above principles, it is then necessary to consider the alleged infirmities in the case for the prosecution. Both learned counsel for the appellants have placed emphasis on the credibility of the witnesses for the prosecution. The presence of "Ivan" the third figure is also apparently crucial in the context of the explanation furnished by the appellants. In the case of the first appellant Ivan was the explanation to account for his presence in the vicinity of the house of the deceased and in the case of the second appellant the explanation for his presence in waiting at the petrol station. The averments of both counsel lead to the following conclusion, that is, that the evidence of the witnesses are so riddled with inconsistencies that this points to the denudation of the case for the prosecution. It is not for this court to construct or reappreciate assiduously the facts of the case for it is noted that HC judge has undertaken that task. The question is whether the HC judge has erred in his evaluation of the circumstantial evidence as opposed to the defence raised by the appellants. D E F

[25] It is contended that SP5's and SP8's evidence are unreliable while the evidence of SP17, 18 and 19 are described as "inherently contradictory". It is notable that the grounds of judgment of the HC judge are punctuated with his findings on the evidence of the witnesses as well as his remarks on his acceptance or otherwise of the evidence of witnesses as well as that of the defence. His evaluation of the evidence of witnesses that provided the link of the appellants to the events that transpired in the house of the accused could be traced from p. 2721 (RR Jld 2 (7)) until p. 2744 (RR Jld 2(8)). The HC judge had stated categorically, as already quoted above, that the appellants were called upon to enter their defence on account of the blood stains seen on their shirts after the crime was G H I

committed. The HC judge also stated affirmatively that this "must irresistibly lead to an inference that they were in the house of the deceased at the time the deceased was attacked and, therefore, the perpetrations of the crime as well. This evidence must also be taken into consideration with the evidence of Wong Wing Hing about what the child had informed."

[26] This specific aspect of the "admission" by the 2nd appellant has been given particular attention by the COA as it is rendered admissible by virtue of s. 21 of the Evidence Act 1950. It is obvious that the HC judge has given credence to what was stated by the 2nd appellant to SP17. In *Biswanath Prasad v. Dwarka Prasad*, the Supreme Court of India held:

> (xvi) Admissions are substantive evidence by themselves, in view of ss. 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under s. 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence, and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

[27] In *Public Prosecutor v. Dato Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215, *supra*, the learned judge stated:

> ..., I shall consider whether the out of court statements of an accused person amount to hearsay. This requires a consideration of ss. 17, 18 and 21 of the Evidence Act 1950 which deal with admissions. Section 17 says that:
>
> > An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Section 18(1) provides that statements made by a party to the proceedings are admissions. The word 'proceeding' in s. 18(1) may be civil or criminal (see *Sarkar on Evidence* (14th Ed) Vol I p 323). An accused is a 'party to the proceeding' (see *Sarkar on Evidence* (15th Ed) Vol I says at p 372). As the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) Vol 1 says at p 739:

> In criminal cases, the accused is always a party, and his admissions are admissible against him, subject of course to the provisions of ss. 24 to 27.

A party's own statements are in all cases admissible against himself (see *Slatterie v. Pooley* 6 M & W 664). Thus, s. 21 provides, *inter alia*, that admission are relevant and may be proved as against the person who makes them. An admission is treated as an exception to the hearsay rule and thus admissible. As *Sarkar on Evidence* (14th Ed) Vol I says at p 309:

> The ordinary idea of hearsay is what is heard out of court from a non-witness, and admissions are therefore generally treated as exceptions to the hearsay rule. Admissions are not, however, open to all the objections applicable to hearsay testimony. It is true that they are unsworn statements made out of court like hearsay testimony, but they are statements not of third persons but of a party to the proceeding and for the reason stated about what a party said against his interest may be presumed to be true.

An admission is therefore substantive evidence of the fact admitted (see *Union of India v. Koksh Builders and Financiers* AIR [1977] SC 409, *Lam Choon & Co v. Lim Yam Hong* [1931] SSLR 96). This rationale is lucidly explained by Subba Rao J in *Sahoo v. State of UP* AIR [1966] SC 40 at p 42 in the following words:

> A scrutiny of the provisions of ss. 17 to 30 of the Evidence Act discloses as one learned author puts it, that statement is a genus, admission is the species and confession is the sub-species. Shortly stated, a confession is a statement made by an accused admitting his guilt. What does the expression 'statement' mean? The dictionary meaning of the word 'statement' is 'the act of stating, reciting or presenting verbally or on paper. The term 'statement', therefore, includes both oral and written statements. Is it also a necessary ingredient of the term that it shall be communicated to another? The dictionary meaning of the term does not warrant any such extension; or the reason of the rule underlying the doctrine of

admission or confession demands it. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be. The following illustration pertaining to a written confession brings out the said idea; A kills B; enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another; indeed, he does not have any intention of communicating it to a third party. Even so, at the trial the said statement of the accused can certainly be proved as a confession made by him. If that be so in the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement. Both must stand on the same footing. This aspect of the doctrine of confession received some treatment from well-known authors on evidence, like Taylor, Best and Phipson. In *'A Treatise on the Law of Evidence'* by Taylor (11th Ed) Vol I, the following statement appears at p 596:

> What the accused has been overheard muttering to himself, or saying to his wife or to any other person in confidence will be receivable in evidence.

In the *Principles of the Law of Evidence* by WM Best (12th Ed), at p 454, it is stated much to the same effect thus:

> Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable.

We also find the following passage in *Phipson on Evidence* (7th Ed). At p 262:

> A statement which the prisoner had been overhead muttering to himself, if otherwise than in his sleep, is admissible against him, if independently proved.

Further reference may be made to Wigmore on *Evidence* Vol IV 1048 (at p 3) as follows:

> The theory of the hearsay rule that an extra-judicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness by cross-examination by the party against whom it is offered, eg if Jones had said out of court: 'The party-opponent Smith borrowed this fifty dollars', Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out of court, 'I borrowed this fifty dollars,' certainly Smith cannot complain of lack of opportunity to cross-examine himself because his assertion is admitted against him. Such a request would be absurd. Hence, the objection of the hearsay rule falls away, because the very basis of the rule is lacking, *viz* the need and prudence of affording an opportunity of cross-examination.

[28] In this appeal the 2nd appellant had responded to certain questions posed to him by SP17. The responses reflected that he has knowledge of events that transpired earlier on. The defence has attempted to detract the evidence by suggesting that SP17 is not a credible as it is averred that he may bear some grudge against the 2nd appellant. If so, then it is not in consonance with this fact that he responded to give the 2nd appellant assistance by fetching him at the Shell petrol station.

[29] In contrast reference to the evidence of the 1st appellant is described as "highly suspect" (RR Jld. 2 (8) p. 2764). After appraising the defence version of the 1st appellant (RR Jld. 2(8) p. 2763) the HC judge summarised up as follows:

> The defence of the 1st accused, in a nut-shell, is one of a total denial of the commission of the offence charged, and that he was never inside the house of the deceased at the time the deceased was assaulted. If anyone was inside the house at the time of the murder, it was the 3rd child and her boyfriend, one mysterious Ivan. The 1st accused testified:
>
> > Apa yang saya ingin memberitahu Mahkamah bahawa saya tidak pernah membunuh orang tetapi apa yang saya silap buat dalam kes ini iaitu membawa teman wanita saya untuk melarikan diri dari rumah.

In the evaluation of the evidence of the 2nd appellant [Jld. 2(8) p. 2779-2792) the HC judge stated, *inter alia*:

> The evidence, that he changed his T-shirt after the bath, and that blood stains were seen on his shirt when he entered the car at the petrol station, must irrefutably suggest that the 4th child was most certainly inside the house of the deceased, at the time the deceased was attacked or soon thereafter. His evidence, that he was dropped off at the Shell petrol station, and that he was waiting at the petrol station for the arrival of Ivan and Jimmy with their respective girl-friend, is definitely a blatant lie. His evidence, that the police had seized a shirt in his house on 13/11/03, is clearly a lie, too, because the police had not produced any shirt in Court seized from his house. His attempt to create doubts that the T-shirt worn by him on the day of the incident had any blood stains, because the police did not produce it, is misconceived, and has failed totally to enhance his defence. The fact that his own counsel had suggested to SP17, in cross-examination, that the 4th child had changed his shirt inside the car and not at SP17's house, flies in the face of the defence of the 4th child.

[30] The HC's decision as affirmed by the COA are primarily attained on the acceptance of the evidence of several of prosecution witnesses. Their evidence have been assailed on various instances by the counsel for the appellants. On this aspect I need to cite what has been considered by this very court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717, 753:

> Learned counsel did not argue that the findings of fact of the learned judge on Bob and Murhaban bin Umar must be reviewed. His submissions is anchored on the premise that the defence evidence on Bob and Murhaban bin Umar is true and must therefore be accepted. This will amount to this court being required to make its own findings of fact. It is settled law that this is no part of the function of an appellate court. The making of a finding of fact is a function exclusively reserved by the law to the trial court (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). What an appellate court can do is to review findings of fact made by a trial court in accordance with principles which are well settled. In this regard reference may be made to *Herchun Singh & Ors. v. PP* [1969] 2 MLJ 209 where Ong Hock Thye CJ said at p 211:
>
> > An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup v. King Emperor* AIR [1934] PC 227.

In *Ye Wei Gen v. PP* [1999] 4 SLR 101 Yong Pung How CJ said at pp 107-108: A

> It is trite law that an appellate court will be slow to overturn the trial judge's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him: *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49, *Lim Ah Poh v. PP* [1992] 1 SLR 713, *Ng Kwee Seng v. PP* [1997] 3 SLR 205, *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656 and *Syed Jafaralsadeg bin Abdul Kadir v. PP* [1998] 3 SLR 788. These cases thus stand for the principles that findings of fact by the trial judge are *prima facie* correct unless there are very good grounds for disturbing them. B C

More recently in *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281 Nik Hashim FCJ in writing for this court at p 294: D

> It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence which is not the case here.

[31] It is submitted before us that there are material flaws in the case for the prosecution emerging from questionable evidence relating to exh. 30 and exh. 51. Exhibit 30 is the T-shirt retrieved from the flat where the 1st appellant stayed with his mother and sister. In this appeal however there are two T-shirts that have been considered, one that was worn by the 1st appellant and the other by the 2nd appellant. E F

[32] The T-shirt retrieved from the flat is described as "BONTTON CLASSIC" on which was seen evidence of blood. Together with the T-shirt were seized a pair of jeans and a pair of shoes. The quibble over the T-shirt is best explained as to how it was dealt with the HC judge in his judgment (RR Jld. 2 (7) p. 2712). The T-shirt sent as one of the samples to the chemist (SP2). The HC judge examined the chain of events whereby sample B1 is the T-shirt "BONTTON" as described in Police Report P68. The HC judge gave his conclusion as follows: G H

> In the light of the evidence of SP2 and the evidence of SP23 and SP26, I have no hesitation in finding that the grey T-shirt exhibit P30 is the very same T-shirt which was seized on 15/11/03 by ASP Ratna from 1st accused's flat. As to why SP23 described the T-shirt seized as "blue" and as to why his initial response that P30 was I

A not the T-shirt seized by him, was clarified by him immediately. The fact the T-shirt seized was in fact a grey T-shirt is corroborated by the police report P68 and the evidence of SP26 who had witnessed the seizure by SP23. Furthermore, SP23 had packed and sealed the shirt he had seized in envelope marked "B1" and SP2 had testified envelope "B1" had contained a grey T-shirt.

B

There was no evidence at all that SP23 had seized more than one T-shirt from the flat of the 1st accused on 15/11/03 to infer or impute that the police are withholding any material evidence.

C Any suggestion that exhibit P30 is not the T-shirt seized by SP23 from the 1st accused's flat on 15/11/03, is untenable. Any imputation that the police have fabricated the evidence relating to this exhibit P30, is totally unfounded, upon a proper and careful evaluation of the evidence given by SP23, SP26 and SP2, in the context of its discovery and seizure at the 1st accused's flat on D 15/11/03, its custody, control and packing, thereafter, by SP23, the delivery of same to the chemist (SP2), and the chemist report (P18) thereon.

In the above circumstances, I am entirely satisfied P30 produced in Court is the very same T-shirt seized by SP23 at the 1st accused's E flat on the date of his arrest, on 15/11/03, after his return from Johore Bharu, notwithstanding SP23's initial response in examination-in-chief that P30 was not the T-shirt he seized at the 1st accused's flat on 15/11/03, upon same being shown to him by the learned DPP, for identification in Court.

F The gist of it as that the HC judge accepted the explanation forwarded by SP23 and concluded that there is no confusion about the T-shirt.

[33] The issue of the T-shirt allegedly worn by 2nd appellant G could also be mentioned in this context. Again what is in question here is a T-shirt that apparently was blue in colour. This shirt was according to the evidence of prosecution witness SP17 taken off in SP17's house where he had a bath and a fresh change of shirt. It would appear from the evidence however that HC judge rejected any H suggestion that a gap had arisen where the T-shirt seen to have been worn by the 2nd appellant (or described as the "original T-shirt") was not produced as an exhibit with the resultant effect that no DNA-profiling of blood was effected unlike P30 where the blood DNA profile matched that of the deceased. The evidence led also I disclosed that neither SP17, SP23 or SP24 was questioned about an

alleged seizure of yet another T-shirt from the 2nd appellant's house. The suggestion that there was a T-shirt seized and belonging to the 2nd appellant only arose at the defence stage. This may indeed be a subtle yet subterfuge in the sense that by creating a situation where there is a T-shirt that is not found or located a gap could therefore be found in the case for the prosecution. It is understood to infer that the non-production of the T-shirt where blood stains were mentioned in the evidence of SP17 and SP8 could therefore cast doubts. The HC judge in his grounds of judgment stated the following on this issue:

> The evidence, that he changed his T-shirt after the bath, and that blood stains were seen on his shirt when he entered the car at the petrol station, must irrefutably suggest that the 4th child was most certainly inside the house of the deceased, at the time the deceased was attacked or soon thereafter. His evidence, that he was dropped off at the Shell petrol station, and that he was waiting at the petrol station for the arrival of Ivan and Jimmy with their respective girl-friend, is definitely a blatant lie. His evidence, that the police had seized a shirt in his house on 13/11/03, is clearly a lie, too, because the police had not produced any shirt in Court seized from his house. His attempt to create doubts that the T-shirt worn by him on the day of the incident had any blood stains because the police did not produce it, is misconceived, and has failed totally to enhance his defence. The fact that his own counsel had suggested to SP17, in cross-examination, that the 4th child had changed his shirt inside the car and not at SP17's house, flies in the face of the defence of the 4th child.
>
> SP17 had testified that he saw blood stains on the 4th child's shirt, and that after the 4th child had his bath he wore SP17's shirt. The testimony of the 4th child, that the original blue T-shirt worn by him on the night of the incident, was seized by the police on 13/11/03 from his house, but was not produced in Court cannot be believed. There was no suggestion to the I.O. that a blue T-shirt, worn by the 4th child on the night of the incident, was seized by the police on 13/11/03. It was never suggested to the I.O. (SP23) that the said blue T-shirt was the very same T-shirt worn by the 4th child at/or about the time of the alleged crime. It was never suggested to the I.O. that the said blue T-shirt was never sent to the chemist. It was never suggested that the said blue T-shirt did not bear any blood stains matching the DNA profile of the deceased.

A In the above circumstances, I am satisfied that the police did not in fact go to the house of the 4th child on 13/11/03, nor did the police seize a blue T-shirt from the house.

On the totality of the evidence, I am satisfied that the 4th child did in fact change his shirt after a bath at SP17's house, and that there B were blood stains on his original T-shirt. In such circumstances, it is my finding that the 4th child was inside the house of the deceased, at the time the deceased was attacked with a parang (exhibit P22).

C **[34]** A similar vein in the defence could also be seen in respect of ID51 which was then ruled admissible by the HC judge as an exhibit to establish that at the time of purchase of the parang exh. P22 the cashier was SP5. The HC judge made a determination that ID51 (now P51) is admissible pursuant to s. 90A Evidence Act D 1950. In this case not only the cashier but the proprietor of the shop SP7 also testified as a witness. SP24 is the witness who found the parang and had given an evidence that on the parang there is a sticker found on the parang. Such sticker inscribed with the words "ha-DIYs" is identical with the stickers found on the parangs sold E from the shop operated by PW7. P51 indicates the name of the cashier, date and time of purchase of the parang. There are suggestions that since exh. P51 does not state the number of the parang 80126 hence no link is provided to P22 (the weapon covered with blood). The fact that bar code 8184284 found on P22 is also F stuck on every parang does not refute the fact that a parang bearing such a bar code was purchased and paid for by the 1st appellant. Nothing was asked about other parangs that could have different numbers. Here again the HC judge having heard the witnesses and based on his ruling that exh. P51 is the receipt issued by the shop G ha-DIY accepted that P22 is a parang brought from the shop. On the parang is identified blood stains the DNA of which matches with that of the deceased. We do not find that there is a material flaw in this finding.

H **[35]** A complaint has also been submitted in respect of the identification parade (IP). It is alleged to be flawed because of the manner in which it is conducted and also on account of contradictions in the identifications of the suspected persons by the witnesses. It is noted that no reference is made in the judgment of the HC judge or the COA about the quality of the identification I parade. In the instant appeal before us there are suggestions posed

by counsel for the defence that the evidence relating to the IP ought to be rejected. In so far as the notes of proceedings have been perused there is no indication that the witnesses particularly SP5, SP6 and SP8 saw the accused persons before the IP and were made to know where the appellants were immediately before the IP took place. SP10 was in charge of the IP. SP26 testified that he had to explain the manner in which the IP is conducted as SP26 comprehends Cantonese and give an explanation to SP8 in Cantonese. With regard to an alleged inconsistency between the evidence of SP5 and SP6 on the identification of the 2nd appellant, the judgment of the Court of Appeal in *Dorai Pandian Munian & Anor v. Pendakwa Raya* [2009] 1 LNS 234 delivered by Ahmad Maarop JCA constitutes relevant statements which are worthy of mention for references are made to judicial precedent from Malaysia, India as well as the Federal Court decision in *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597. The statements to be mentioned are:

> [33] In *Malkhansingh v. State of Madya Pradesh* [2003] CRI LJ 3535 at 3538, BP Singh J delivering the judgment of the Indian Supreme Court said:
>
> 7. *It is trite to say that the substantive evidence is the evidence of identification in court.* Apart from the clear provisions of s. 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this court. The facts, which establish the identity of the accused persons, are relevant under s. 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. *This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.* The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades

A

> are essentially governed by s 162 of the Code of Criminal Procedure. *Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.* (See *Kanta Prashad v. Delhi Administration* AIR [1958] SC 350); *Valkuntam Chandrappa & Ors v. State of Andhra Pradesh* AIR [1960] SC 1340; *Budhsen & Anor v. State of UP* AIR [1970] SC 1321 and *Rameshwar Singh v. State of Jammu and Kashmir* [1971] 2 SCC 715. (emphasis added).

B

C

[34] In *Vaikuntam Chandrappa v. State of AP* [1960] Cri LJ 1681, Wanchoo J said:

> It is also true that the substantive evidence is the statement in court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. *There may be exception to this rule where the court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding.* (emphasis added).

D

E

[35] So, it cannot be laid down as a rule of law that without identification parade, the evidence of a witness in a trial is not worthy of consideration. Indeed, to hold that an identification parade, must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. This was made clear in the judgment of the Federal Court in *Arumugam s/o Muthusamy v. PP* [1998] 3 CLJ 597.

F

G

…

[39] Commenting on the Turnbull guidelines, the Privy Council said in *Nembhard (Neville) v. The Queen* [1982] 74 Cr App R 144:

> *Turnbull* does not purport to change the law: *It provides a most valuable analysis of the various circumstances which common sense suggest or experience has shown may affect the reliability of a witness's evidence of identification* and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. Turnbull sets out what the judgment itself described as "guidelines for trial judges" who are obliged to direct juries in such cases. (emphasis added).

H

I

[40] The *Turnbull* guidelines had been accepted in Malaysia (see *Rangapulla and Anor v. PP* [1982] 1 MLJ 91; *Dato' Mokhtar b Hashim v. PP* [1983] 2 MLJ 232; *Yau Heng Fang v. PP* [1985] 2 MLJ 335 and *Arumugam s/o Muthusamy v. PP (supra)*. On the application of the *Turnbull* guidelines to the local cases, this court in *Tan Kim Hoo v. PP (and Another Appeal)* [2007] 5 AMR 557; [2007] 6 CLJ 557 adopted and applied the following passage in the judgment of Karthigesu JA in *Heng Aik Ren Thomas v. PP* [1998] 3 SLR 465, at 475-476:

> In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.
>
> If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification evidence is good, he may then go on to safely assess the value of the identification evidence.
>
> Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor

A identification evidence would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

B **[36]** It is found that whatever allegations that are made of any impropriety in the conduct of IP do not create infirmities for as indicated earlier on the HC judge has examined relevant portions of the evidence of the witnesses. Through his statements the HC judge has disclosed that the inference that the appellants are the C perpetrators is not founded primarily on the IP. Instead the IP was made as a further test of the dock identification by the witnesses. No reasonable basis is detected for the IP to be rejected.

[37] The next issue to be considered is the alleged failure to call D certain witnesses, the failure of which would attract the application of s. 114(g) Evidence Act 1950 the provision so frequently relied upon to draw adverse inferences. It is notable that in this case several statements may have been recorded. The prosecution has not chosen to produce and neither has the defence made any application E for the statements (if any) to be produced. However no particular adverse inference can be drawn from its non-production (per Augustine Paul J, as he then was) in *Public Prosecutor v. Dato Seri Anwar bin Ibrahim* [1999] 2 MLJ 1. Augustine Paul J (as he then was) explained in *Public Prosecutor v. Dato Seri Anwar bin Ibrahim* F [1999] 2 MLJ 1, 186:

In any event as a police statement is privileged, no adverse inference can be drawn from (its) non production. This is based on the principle that the drawing of an adverse inference for the failure to produce a privileged document would be to destroy the privilege G itself (see *Western v. Peary Mohan Dass* [1912] ILR 40 Cal 898, *Dulhun v. Harnandan* 30 Mad LJ 624.

[38] Learned counsel for both the appellant made reference to *Abdullah Zawawi v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 to H suggest that the non-calling of witnesses such as Sathiya who was with SP8, and Pang Tze Ling who is a sister of DW4, should give rise to adverse inferences. The answer to this is stated by Augustine Paul J (as he then was) in *Public Prosecutor v. Dato Seri Anwar bin Ibrahim (No. 3)* [1999] 2 MLJ 1 (HC):

I

It is settled law that in a criminal trial the prosecution has a discretion, provided that there is no wrong motive, as to whether or not to call any particular witness and in particular has a discretion not to call in support of its case a witness whom it does not believe to be a witness of truth (see *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105, *Adel Muhammed el Dabbah v. Attorney General for Palestine* [1944] AC 156). There is no obligation compelling the prosecution to call all witnesses who speak to facts which it desires to prove (see *Malak Khan v. Emperor* 72 IA 305; AIR [1946] PC 16). Thus, the prosecution is not duty bound to call all the witnesses from whom statements may have been taken (see *Public Prosecutor v. Teh Cheng Poh* [1980] 1 MLJ 251). This accords with section 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This section enshrines the well recognized maxim that 'evidence has to be weighed and not counted'. As a general rule, a court can and may act on the testimony of a single witness though uncorroborated and one credible witness outweighs the testimony of a number of other witnesses of indifferent character (see *Vadivelu Thevar v. State of Madras* AIR [1957] SC 614). What is significant is that the prosecution must call the necessary witnesses to unfold the narrative upon which its case is based. In this regard, reference may be made to the advice delivered by the Privy Council in the celebrated case of *Seneviratne v. R* [1936] 3 All ER 36 where Lord Roche said at pages 48-49:

> ... Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.

On the type of witnesses who must be called by the prosecution, Lord Roche said in the same case at page 49:

> ... Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution.

Thus, an adverse inference for not calling a witness cannot be drawn if there is sufficient other evidence to support the prosecution case (see *Namasiyiam & Ors v. Public Prosecutor* [1987] 2 MLJ 336). No adverse inference can also be drawn when a witness has been offered for cross-examination (see *Saw Thean Teik v. R* [1953] MLJ 124) or has been made available to the defence and the defence did not call the witness (see *Public Prosecutor v. Chee Kon Fatt* [1991] 3 CLJ 2564). If a witness had been made available to the defence, there can be no suggestion, as stated by Lord Thankerton in the case of *Adel Muhammed el Dabbah v. Attorney General for Palestine*, '... that the prosecutor has been influenced by some oblique motive' (see *Samsudin v. Public Prosecutor* [1962] MLJ 405). However, where the prosecution evidence falls short of proving a *prima facie* case, the right of not calling a witness by merely offering him to the defence will not be available (see *Abdullah Zawawi v. Public Prosecutor* [1985] 2 MLJ 16; *Public Prosecutor v. Chew Yoo Choi* [1990] 2 MLJ 444; *Teoh Hoe Chye v. Public Prosecutor* [1987] 1 MLJ 220).

However the presumption will arise where there is acute conflict on a material point in the evidence presented. In this regard Edgar Joseph Jr FCJ said in *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209 (FC) at page 220:

> We must add that, in a situation such as this, where there was an acute conflict of evidence on a material point, namely, the result of the search of the person of the accused, and a search list contemporaneously prepared by the police was presumably in existence, a copy thereof, ought, in all fairness, to be tendered in evidence or its non-production accounted for, the sanction for not doing so being the presumption, that if produced, it would have been unfavourable to the prosecution. (See section 114(g) Evidence Act 1950). Instead, the judge did the opposite – he wrongly assumed that a copy of the search list was in evidence, and went on to presume that its contents supported the version of ASP Abdul Wahab.

[39] The drawing of an adverse inference would largely depend on the circumstances of the case. In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, 223 SC Mohamed Azmi SC (as he then was) stated:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is a withholding or suppression of evidence and not merely on account of failure to

> obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non production of not just any witness but an important and material.

This could well be illustrated in the case of not calling Sathiya. Sathiya was offered to the evidence but it is in evidence that Sathiya could not identify a person or persons at the identification. In this instance it could not be considered a suppression of evidence. Pang Kah Yee alleged to be very much with the 2nd appellant that night only joined the group in SP17's house after the appellants were picked up from behind the Shell station. There is here not a defence of *alibi* but a defence of being present at the Shell station for a different purpose. With regard to Pang Tze Ling (or Chee Ling) SP17 stated:

> ... Arah stesen minyak Shell dan rumah Tze Ling dari restoran adalah berlainan.
>
> Saya tidak membawa Tze Ling dari restoran bersama-sama saya ke stesen minyak Shell. Saya tidak membawa Tze Ling ke stesen minyak Shell kerana Tze Ling hendak balik ke rumah dahulu. Dia cakap kepada pemandu kereta selepas beredar dari restoran dan masa dalam kereta, selepas panggilan telefon. Saya tidak tahu samada Tze Ling mengetahui kami akan pergi menjemput Dexter.

[40] Hence there is no merit in this argument above adverse inferences especially as in this case, the audio visual advantage of the HC judge provided him with the basis of establishing the *prima facie* case and hence we conclude that there are no so called "gaps" to be filled in as they are not material.

[41] In essence the defence which has been described as an "afterthought" is entirely dependent upon the existence of "Ivan". Throughout the defence Ivan is the person alleged to be buying the parang in the presence of the appellants, planning to help KSK to escape as well as the person is alleged to have requested the 2nd appellant to obtain transport. Nevertheless in its totality the question here is whether the defence did adduce evidence to rebut such that it would succeed in the prosecution failing to establish its case beyond a reasonable doubt.

[42] Throughout the defence Ivan is supposedly the key person responsible, the reason for going to the house of the deceased. It is found that the defence itself did comprise denials. In one of the questions in the course of cross-examination, 1st appellant had replied, *inter alia*:

> Ivan yang suruh naik teksi ke rumah Sue Yin. Tujuan menaiki teksi ke rumah Sue Yin untuk membawa beliau lari dari rumah. Saya akan membawa Sue Yin, dimana Ivan akan membawa Sue Kin. Bukan, membawa mereka lari dengan teksi.
>
> Dexter telah disuruh turun dekat stesen minyak Shell. Benar stesen Shell ini gelap. Stesen Shell ini adalah yang sama dimana saya lari dari rumah Sue Yin apabila mendengar jeritan malam itu.
>
> Jarak antara rumah Ku Sue Yin dan stesen minyak Shell saya tidak tahu tetapi perlu makan masa 10 hingga 15 minit kalau berjalan kaki.
>
> Saya tidak tahu kenapa Dexter perlu menunggu dekat stesen minyak Shell dan bukan dekat rumah Ku Sue Yin, tetapi Ivan menyuruh Dexter tunggu di sana. Dexter dan saya tidak tanya pada Ivan kenapa Dexter perlu tunggu di sana. Benar Dexter tunggu di sana dalam keadaan gelap.
>
> Soalan: Katakan awak memberi keterangan bahawa Dexter telah tunggu di stesen minyak Shell oleh kerana ingin memberi keterangan selari dengan keterangan pendakwaan bahawa kamu dan Dexter naik kereta bersama Wing Hing, Hon Boon dan Ah Kok dekat stesen minyak Shell tersebut?
>
> Jawapan: Saya tidak setuju.
>
> Soalan: Katakan kamu berdua memilih stesen minyak Shell ini kerana stesen minyak Shell itu gelap dan kamu berdua dapat menyembunyikan diri daripada dilihat oleh orang lain sebab pakaian kedua awak ada darah kerana baru lepas melakukan pembunuhan di rumah Sue Yin?
>
> Jawapan: Tak setuju.
>
> Selepas menurunkan Dexter dekat stesen Shell saya dan Ivan terus pergi berdekatan rumah Sue Yin dan kami berdua turun daripada teksi. Ivan yang bayar kepada pemandu teksi. Saya tidak dengar Ivan suruh pemandu teksi tunggu di sana. Selepas saya turun daripada teksi saya pergi ke sebuah gerai dan membeli rokok.

[43] The issue here therefore arises if Ivan was indeed a third person where did the parang came from as nothing was stated about it. There are several instances throughout the defence where Ivan is imputed as a dubious character who is not only involved with gangsters but also quarrelsome. The following response of the 1st appellant also serve as an example where the 1st appellant merely denied what was seen on his shirt by the prosecution witnesses, SP17 as blood when he said:

> Kotoran pada baju T saya yang saya tinggal di bilik mandi rumah Wing Hing adalah terkena semasa saya panjat masuk dan keluar pintu gate rumah Sue Yin. Saya tidak pasti samada kotoran itu cat atau tidak. Saya tidak ambil T-shirt pulang kerana bau busuk. Saya memang cadang untuk mengambil balik T-shirt.

On this particular aspect the trial judge had found that the 1st appellant was lying as at the time he was supposed to call the 2nd appellant to retrieve the shirt, the 2nd appellant was already in police custody.

[44] The evidence of the 2nd appellant is described as a "carbon copy" of the 1st appellant with regard to Ivan. The following is the description:

> Saya telah kenal dengan Ivan lebih kurang 6 bulan sebelum 9/11/03. Benar saya panggil dia dengan nama Ah Choy juga.
>
> Rambut beliau panjang setakat leher. Saya kenal Ivan melalui kawan. Kawan itu lebih kenal Ivan daripada saya. Nama kawan saya itu ialah Johnson. Saya tidak tahu nama penuh Johnson.
>
> Ivan adalah seorang ahli kongsi gelap. Johnson bukan seorang ahli kongsi gelap.
>
> Ivan adalah ahli kongsi gelap "PJ 24". Saya diberitahu oleh Ivan bahawa dia seorang ahli kongsi gelap. Saya tidak tahu samada beliau seorang ahli aktif kongsi gelap pada bulan November 2003. Benar sewaktu saya mula-mula kenal dia saya sudah tahu beliau seorang ahli kongsi gelap.

[45] The statements of denials could be discerned from the following (as an example):

> Selepas saya mandi dan turun dan sebelum Jimmy pergi naik mandi tiada perbualan diantara saya, Jimmy dan Wing Hing. Pada masa itu Wing Hing sedang bercakap telefon.

A Soalan: Katakan bahawa ada berlaku perbualan antara kamu dan Wing Hing dalam kehadiran Jimmy dan Hon Boon sebelum Jimmy naik mandi?

Jawapan: Tidak bersetuju.

B Soalan: Katakan pada masa itu Wing Hing bertanya pada kamu "Apakah hal tadi?" dan kamu jawab kepada Wing Hing bahawa kamu bersama-sama Jimmy telah memukul bapa orang dan Wing Hing seterusnya tanya "Bila dan mana kamu berdua memukul bapa orang?" dan kamu kata pada Wing Hing, "Waktu Wing Hing dan kawan-kawan menjemput saya dan Jimmy di stesen minyak Shell"?

C

Jawapan: Tidak setuju.

Soalan: Katakan selanjutnya kamu memberitahu Wing Hing kamu dan Jimmy telah memukul orang di rumah sahabat wanita Jimmy dan kamu kata selepas memukul orang kamu pun telah menelefon Ah Boon?

D

Jawapan: Tidak setuju.

E Soalan: Katakan seterusnya Wing Hing telah tanya kamu, "Apakah maksud memukul orang?" dan kamu kata kepada Wing Hing, kamu bersama-sama dengan Jimmy telah memukul orang dan mungkin secara tidak sengaja telah menyebabkan kematian?

F Jawapan: Tidak setuju.

Soalan: Katakan seterusnya Wing Hing telah tanya pada kamu "Apakah senjata yang digunakan?" dan kamu kata pisau?

Jawapan: Tidak setuju.

G Selepas Jimmy mandi dan terus ke bawah dan duduk atas sofa, saya tidak nampak beliau memakai baju asalnya ataupun baju lain.

Saya tidak tanya Jimmy dimana dia meletakkan baju asalnya. Jimmy juga tidak memberitahu saya dimana beliau meletakkan bajunya.

H

[46] In *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857, this court through the judgment of Arifin bin Zakaria FCJ (now CJ (M)) opined *(inter alia)*:

I

... What needs to be considered is whether the discrepancies relate to material aspects of the case or otherwise. As stated in *Sarkar on Evidence*, 15th Edn, p 112:

> Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence (*Sidhan v. State of Kerala* [1986] Cri LJ 470, 473 (Ker)). But discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony (*Brij Lal v. Kunwar*, 36 A 187; 18 CWN 649; A 1914 PC 38). The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it (*Krishna Pillai Sree Kumar v. State of Kerala*, A [1981] SC 1237, 1239; [1981] Cri LJ 734).

[47] The counsel for both appellants have urged upon us that the prosecution's argument that "Ivan" is an "afterthought" is fallible and misconceived. The name "Ivan" surfaced during the defence stage. The defence however contends that there was already the hint of Ivan during the cross-examination of PW5 and Pang Tze Ling who is said to know Ivan. The criticism levelled against the prosecution's case is that the police has done little or nothing to investigate about Ivan.

[48] It has been pointed out correctly however that the name Ivan emerged with several other names. But if the purchase of the parang and the plan to help the sisters were to have been orchestrated by Ivan who according to the defence is a gangster and the key person to facilitate the escape of the sisters it is definitely noticeable that nothing has been raised about Ivan at the stage of the cross-examination of the prosecution's witnesses on behalf of the sisters who were also charged. This would have been a reasonable expectation if the person named Ivan was indeed to be largely instrumental to execute a plan to facilitate the escape of the sisters.

[49] In *Chua Beow Huat v. PP* [1968] 1 LNS 24, Sharma J referred to the case of *AEG Carapiet v. A Y Derderian* [1961] Cal 359 where Mukharji J said that:

A The law is clear on the subject. Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of
B essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound
C to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to
D miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

E **[50]** There are in fact findings made by the HC judge which militate against the allegation that Ivan was a known factor to the KSK and KSY and this was when he stated:

... There was no evidence of any plan between the 1st accused and the 2nd child, who is said to be his girl friend, to commit the
F offence. There is no evidence that the 3rd child had met the 1st accused and the 4th child at the house on the night of the crime. There was no evidence that the 3rd child was aware of the crime or participated in the commission of the crime as she was asleep in her room. There was no evidence that the 2nd or 3rd child had
G facilitated the entry into the house of the deceased, the 1st accused, the 4th child, or any other person, for the commission of the offence. There was no evidence that the 2nd child knew that the 1st accused would have been outside the house, when she sneaked out of the house through the window of her room, in order to meet Chen Boon Chin (SP13) after her call to him at 12.10 am, on 12/
H 11/03. There was evidence from SP8 that the 3rd child had intended to sneak out of the house ("curi keluar") that night, but the fact she aborted her plan seems to suggest something unexpected and unplanned had occurred.

I

A

> ...
>
> Although there was evidence that the 2nd child had met the 1st accused, immediately after she had sneaked out of the house through the window of her room, there is no evidence that this was a pre-arranged meeting between them.

B

[51] The above finding by itself negated the contention that there was some plan in existence where Ivan figures in it to assist in the escape. There were inconsistencies in the explanation furnished by the appellants. If Ivan was indeed there alone or with another person it is not in consonance with the finding of the HC judge C that neither of the sisters seems to be aware of a plan. It is highly questionable that if there is a person called Ivan said to be the boyfriend of one of the sisters, that neither sister seems to be aware of any escapade plan in existence involving someone by the name Ivan where he is to be present. If Ivan is not a non-existent, is it D really the prosecution that has to produce Ivan as a witness? This issue is in essence interwoven with the allegations that the prosecution has failed to call certain witnesses eg, Pang Tze Ling, ACP Osman bin Bakar, Ketua Polis Daerah Subang Jaya at that time, to whom the 2nd appellant surrendered himself. This E necessitates the observation of Augustine Paul J in *Public Prosecutor v. Dato Seri Anwar bin Ibrahim (No. 3), supra*:

> ... it is no part of the prosecution's duty to prove the case for the defence.

F

With regard to witnesses who are considered material to the defence case the learned judge said:

> If the defence had felt they were material to its case, it ought to have called them. The failure to call them, though no adverse G inference can be drawn therefrom, on the ground that they may be hostile indicates the defence's lack of confidence in having them on their witness stand. The defence must be aware of s. 154 of the Evidence Act 1950 which deals with the manner of treating hostile witnesses. To therefore argue that the prosecution ought to have called them on that ground cannot be sustained. Be that as it may, H the question of rebuttal evidence from these witnesses only arises if the defence had successfully adduced evidence that requires to be rebutted by them. (ie, the prosecution).

I

[52] It is to noted both the appellants claimed that Ivan had told them KSK and KSY are sisters and have suffered from the treatment of their step father. If the 1st appellant who is supposedly to be the person to share the intention with Ivan to help the sisters flee from the house, his conduct in fleeing to the Shell petrol station and leaving KSY at the restaurant is not consistent with a so called plan that includes the sisters.

[53] After having evaluated the evidence on record in its totality, we are constrained to find that the infirmities alleged of the prosecution's case are untenable. On the assertions before us that the Court of Appeal has displayed lack of appreciation of the evidence it is found that this is negated where the learned judge stated:

> We accept that finding as entirely correct based on the proved facts before the learned.

[54] Preceding this statement is a perusal again of the case for the prosecution as follows:

> The evidence upon which the public prosecutor relies in support of his appeal is as follows. First, the nature of the injuries suffered by the deceased. These are such as to point to an intention to kill on the part of those who inflicted them. Second, the other evidence which the public prosecutor says irresistibly points to the 1st accused and the 4th child as being the assailants who inflicted the wounds on the deceased. In the first place, there is evidence that the 1st accused and the 4th child purchased two parangs from PW5 and PW6. One of the parangs is Exh. P22. In the second place, there is the evidence of PW17 and PW18. In a gist, this is what the two witnesses said. At a little past midnight, PW18 received a telephone call on his mobile from the 4th child asking to be picked up from a Shell petrol station at USJ. PW17 and PW18 went along. On arrival, the 1st accused and the 4th child emerged from the petrol station and entered the car. PW19 was driving it. Both PW17 and PW18 noticed that the clothing of the 1st accused and the 4th child was blood stained. Also, the 4th child appeared to be in a state of shock. While in the car, the 4th child informed PW17 and PW18 that he and the 1st accused had hit someone's father. All those in the car then proceeded to PW17's home where the 4th child had a shower and changed his clothes. PW17 then asked him what had happened. In response, the 4th child said that he and the 1st accused had killed someone but with no intention to cause death. These statements, submits the learned deputy who argued

the appeal before us are admissible as admissions under s. 21 of the Evidence Act 1950. In the third place, there is the blood stained clothing later recovered by the police during investigation which carried the blood of the deceased as established by DNA testing. A similar test was conducted on the blood stain found on Exh. P22 which established that that weapon carried the deceased's blood. In the fourth place, there is evidence showing that the police party who arrived at the scene of the crime had used a tracker dog which had led them from the deceased's house to the very Shell station where PW17 and PW18 had picked up the 1st accused and the 4th child. Lastly, there is evidence to show that the 1st accused was seen in the compound of the deceased's house at about the time the crime was committed.

[55] In *Udaipal Singh v. State of Uttar Pradesh* AIR [1972] SC 54; [1972] 4 SCC 142, the Supreme Court observed:

(xxi) In cases where only circumstantial evidence is available at the outset one normally starts looking for motive and the opportunity to commit the crime. If the evidence shows that the accused having a strong enough motive had the opportunity of committing the crime and the established circumstances on the record considered along with explanation, if any, of the accused exclude the reasonable possibility of any-one else being the real culprit then the chain of evidence can be considered to be so complete so as to show that within all human probability, the crime must have been committed by the accused. He may in that event, safely be held guilty on such circumstantial evidence.

[56] With the rejection of the existence of Ivan the circumstances in this appeal merit a reflection of the words of Fazal Ali J in delivering the judgment in *Ram Avtar v. The State (Delhi Administration)* AIR [1985] SC 1692:

At the very outset we might mention that circumstantial evidence must be complete and conclusive before accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words *where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be*

A *defeated*. The learned Sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned Sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.

... It is not possible for us to consider the various chains of circumstances, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ... .

Before concluding we might observe that where circumstantial evidence consists of a chain of continuous circumstances linked up with one another, the court has to take the cumulative effect of the entire evidence led by the prosecution before acquitting or convicting an accused. (emphasis added.)

[57] With regard to the question of proof mention could be made of the judicial decision in *Public Prosecutor v. Wong Wai Hung & Anor* [1993] 1 SLR 927, Rubin JC stated, *inter alia*:

E It is trite law that when the prosecution relies wholly on circumstantial evidence, the quantum of proof must be more than mere skeletons. The first and foremost principle to be borne in mind when approaching circumstantial evidence is set out in *Idris v. PP* [1960] MLJ 296 at 297 (where Hill Ag CJ quoted with approval the trial judge's summing up to the jury and his quotation of the words of Lord Cairns in *Belhaven & Stenton Peerage* [1875-6] LR 1 App Cas 278 at 279):

> ... in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

In other words, circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If

the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

[58] The question that is to be considered is can it be said that there has been occasioned a misdirection or that the decision of the HC judge as affirmed by the COA is plainly unsound. The answer is in the negative.

The Second Principal Issue: Common Intention

[59] It is on this second principal issue that there is divergence between HC and the COA. The COA held that the learned HC judge had "misdirected himself on facts and evidence and upon the law in holding that the lesser offence under s. 304 had been committed."

[60] In delivering the judgment of the COA, Gopal Sri Ram JCA in the course of his judgment made references to the reasons advanced by the HC judge which the COA found became the central cause for the HC judge to reduce the charge to one under s. 304 Penal Code. The HC judge had firstly stated:

> Based on the testimony of SP20, it is clear that there were only 2 persons inside the room of Sue Yin. In view of my finding that 1st accused and 4th child were inside the house of the deceased, and in the absence of evidence of any other intruders, *I find that it was the 1st accused and 4th child who were inside Sue Yin's room. Based on SP20's evidence, it is clear that one of them had attempted to attack her when she opened the door of Sue Yin's room.* It is also my finding, that upon deceased going to investigate who the intruders were, he was attacked inside the room (of Sue Yin) by one of them with a parang. *However, I am unable to determine, on the evidence, whether it was the 1st accused or the 4th child who attacked him. Nevertheless, it is obvious that at that stage there was no intention at all to kill the deceased, otherwise they would have pursued him to his bedroom, after the attack on him* in Sue Yin's room. Again, based on SP20's testimony it is safe to infer, that because the deceased had not returned to Sue Yin's room, but, instead, had run downstairs, he must have been aware that the 1st accused and 4th child were attempting to flee from the house, after the initial attack on him in Sue Yin's room, without intending to cause him any further injury. Nevertheless, it would appear that the deceased was determined, *either to apprehend them or put up a fight with them, in the belief, in all probability, that his superior physical build (117 Kg) in contrast to*

A *the puny size of the 1st accused and 4th child, would enable him to overpower them. Unfortunately, this must have triggered a further attack on the deceased downstairs, either by the 1st accused or the 4th child, when he attempted to overpower them on their way out of the house. In all probability, the fatal injury must have* been inflicted, unintentionally, in this "fight" downstairs.

B

Again, based on the testimony of SP20, who testified that she saw one of the intruders running downstairs when she opened her bedroom door, and that he came back towards her, *it can be inferred that this person could be no other than either the 1st accused or*

C *the 4th child in the process of fleeing out of the house, after placing the parang neatly away on the window sill of Sue Yin's room, immediately before, or after the collapse of the deceased, downstairs.*

It is my finding, that as there was clearly no intention to kill the deceased, the 1st accused and 4th child cannot be found guilty of

D the offence of murder under s. 302 Penal Code, notwithstanding the 23 injuries found on the deceased and the nature of the weapon used - a 22 inch parang (exhibit P22). Bearing in mind that it is difficult to infer who actually inflicted the injuries with the parang on the deceased, and the fact that only 1 weapon was recovered,

E justice would be done if both of them are given the benefit of the doubt for the commission of the offence under s. 302 Penal Code, but, instead, found guilty only of the lesser offence of culpable homicide not amounting to murder, under s. 304 Penal Code, 2nd limb.

F In the above circumstances, the 1st accused is found guilty and convicted of the offence under s. 304 Penal Code, 2nd limb. There shall be recorded a finding of guilt as against the 4th child for an offence under s. 304 Penal Code, 2nd limb. (emphasis added)

[61] The COA described the above quoted paragraphs in the

G judgment of the HC as "pure speculation". The COA then proceeded to consider the matter in the following terms:

It was submitted that this is a case in which the learned judge was attributing a defence to the accused which had not been advanced

H by either of them or warranted by the evidence that had been placed before the court. After very careful and anxious consideration, we have arrived at the conclusion that there is merit in this argument. First, there is not an *iota* of evidence to suggest that the deceased had pursued his attackers in the manner described by the learned judge. On the other hand, there is evidence to show

I that one of the attackers had gone after the deceased. That is

indeed what PW20 said. Second, there are the injuries suffered by the deceased. Third, there is the weapon Exh. P22 that was used to inflict the injuries in question.

In answer to these points, learned counsel for both the 1st accused as well as the 4th child have argued that there is material within the prosecution's case which negates an intention to kill. They relied principally on the statement made by the 4th child to PW17. In that statement the 4th child had said that there was no intention to kill. It is submitted that since this forms part of the prosecution's case, the defence is entitled to rely on it to show that one of the vital ingredients of the offence of murder had not been made out. With respect, we do not agree. What PW17 was narrating was the 4th child's version given to him. The prosecution however led cogent evidence to show that the suggestion that there was no intention to kill was untrue. Next, it was submitted for the 1st accused and the 4th child that the learned trial judge was entitled to make a finding that both accused were attempting to flee the deceased's house by means of the staircase. However, as pointed out by the learned deputy who has argued this appeal, if the accused really wished to make an escape they could have done so through SY's room. For, there is evidence to show that SY herself had left the house by exiting through her room.

[62] In the evaluation of the decision of the COA, two material aspects could be discerned. Firstly, the HC judge in his grounds of judgment, referred to above by the COA, appeared to have entered into a series of conjectures unsupported by evidence and secondly, the issue of s. 34 of the Penal Code has not been properly considered. We note that the conjectures led to contradictions resulting in misdirection on the question of common intention.

[63] The COA in giving its decision considered rightly so, the question of intention in relation to s. 300 of the Penal Code. The COA referred to *Virsa Singh v. State* AIR [1958] SC 465, *Jai Prakash v. State (Delhi Administration)* [1991] AIR SCW 654 and *Jagrup Singh v. The State of Haryana* AIR [1981] SC 1552 in appraising the law on whether intention to kill is established in a given case (para 8 and 9). Having considered the law the COA (at para. 10) stated:

Applying the foregoing principles to the facts of this case, the following conclusions may be safely arrived at. Firstly, it was the 1st accused and the 4th child or either or both of them who must have inflicted the fatal injuries on the deceased. Secondly, applying the third limb of s. 300 of the Penal Code they must be taken to have

A intended to cause the injuries found on the deceased. Thirdly, they must have intended thereby to cause the death of the deceased. Fourthly, the attack on the deceased was pre-planned. This is supported by the purchase of the two parangs including Exh. P22 and the stealthy manner in which the 1st accused and the 4th child
B entered the deceased's house. It is equally supported by the fact that one of them – either the 1st accused or the fourth child - pursued the deceased down the staircase of the deceased's home. Thus, taking into account the element of premeditation, the nature of the weapon used, the nature of the injuries inflicted on the deceased which indicate a savage attack and all the other
C surrounding circumstances to which reference has already been made, the irresistible conclusion that a reasonable tribunal properly directing itself upon the law and the totality of the evidence would arrive at is that both accused intended to kill the deceased.

D **[64]** The question here is whether it could be said that the HC judge has properly addressed the issue of common intention. The further question is whether the HC judge could draw inferences from matters which, materially, are his very own conjectures. Our responses to both questions are in the negative.

E **[65]** The COA has expressed views on the application of s. 34 Penal Code. In addition to the decision in *Tan Hung Thiam & Anor v. Public Prosecutor* [1991] 1 LNS 63, it is beneficial for the purposes of this appeal to mention *Shaiful Edham bin Adam & Anor v. Public*
F *Prosecutor* [1999] 2 SCR 57. The analysis undertaken of the various words namely, "act", "in furtherance of the common intention of all", "done by several persons" demonstrate the relevance of detailing the judgment with greater particularisation. The following passages are worthy of mention (per Yong Pung How CJ):

G The common intention point – the law

Section 34 of the Penal Code (Cap 224) ('the Penal Code') which embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention, reads as follows:

H

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

I

It is not without significance that the original draft of the Indian Penal Code did not contain the phrase 'in furtherance of the common intention of all'. The words were inserted by s. 1 of Act xxvii of 1870 (India). When the Indian Penal Code was introduced into the Straits Settlements in 1872 and the Federated and unfederated Malay States, the section as amended was also received.

Section 33 states that the word 'act' denotes a series of acts as well as a single act; and the word 'omission' denotes a series of omissions as well as a single omission. It follows that the words in s. 34 'when a criminal act is done by several persons' may be construed to mean 'when criminal acts are done by several persons'. Thus, where different acts in a criminal enterprise are committed by different participants, such participants may still be regarded as having done 'a criminal act' for the purposes of liability under s. 34. The *raison d'etre*, as it were, of s. 34 was to meet the situation where it may be difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operates to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the *actus reus* himself. This was recognised by Lord Sumner in the Privy Council decision in *Barendra Kumar Ghosh v. Emperor* AIR [1925] PC 1 at p 5:

> The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact, but the rule is one that has never left the Indian courts in much doubt.

The problem is to define the conditions under which liability is to be imposed. In this respect, s. 34 has had a chequered interpretation, though the position is not now in doubt due to the numerous judgments (which we will refer to in due course) in which the leading authorities have been stated and re-stated. At the outset, however, the controversy had its genesis in the words 'criminal act' and 'common intention' contained in s. 34. This found expression in two divergent lines of authority. On the one hand there were those authorities (*R v. Vincent Banka* [1936] MLJ 53 is always cited) which held that the common intention should refer to the crime actually committed and that it was not sufficient that there should be merely a common intention to 'behave criminally'. On the other hand there were those authorities which took a wider view of the expression 'criminal act': it was not necessary to show that there existed a common intention to commit the crime actually committed and for which the accused were ultimately charged; it was sufficient so long as the criminal act complained of was committed in furtherance of the common intention. Really the difference in the two views, as will be shown, lies in the content of the expression 'common intention'. We propose to discuss the elements of s. 34 under the following headings: (1) common intention; (2) 'in furtherance of the common intention of all'; and (3) participation in the criminal act.

(1) Common Intention

In *Vincent Banka*, the two appellants were charged with committing robbery and murder in the course of robbery. Evidence was inconclusive as to which of the two appellants had carried the knife or inflicted the fatal wound. They were convicted on both charges and appealed against their convictions for murder. The appeal was allowed, Huggard CJ said at p 69:

> It follows that it is the duty of the trial judge, in cases where s. 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

And at p 70:

> ... under the terms of that section (ie s. 34 of the Penal Code) as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'.

It was clear that the two appellants had set out to commit robbery. Regarding the murder, however, evidence was inconclusive as to who had carried the knife or inflicted the fatal wound. Applying the test enunciated by Huggard CJ, the court held that there must be evidence that there was a common intention between the robbers not merely to commit robbery but also, if necessary, to kill the deceased. Since there was no evidence of any express agreement between the appellants that a knife should be carried or that the victim should be stabbed, the court convicted them only of robbery and acquitted them of murder.

The fallacy in this kind of reasoning was demonstrated by Lord Sumner in *Barendra Kumar Ghosh v. Emperor*, the leading Indian authority. The facts were that the appellant, together with a few others, had gone to a Post Office in Bengal to demand money from the sub-postmaster. All of them fired at the sub-postmaster with their pistols. He was hit in two places and died almost instantly. The appellant was arrested after the others fled. The trial judge directed the jury that the appellant might be the man who fired the fatal shot and that if the jury were satisfied that the sub-postmaster had been killed in furtherance of the common intention of all, the appellant was guilty of murder whether he fired the fatal shot or not. The appellant was convicted of murder by the jury. Lord Sumner said at pp 5-6 and 9 of the report:

> The appellant's argument is, in brief, that in s. 34, 'a criminal act', in so far as murder is concerned, means an act which takes life criminally within s. 302, because the section concludes by saying 'is liable for that act in the same manner as if the act were done by himself alone', and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim.
>
> Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common at all.
>
> It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself. Criminal action, which takes the form of acts

A by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment.

B By the way of illustration it may be noted that, in effect, this means, that if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the C evidence inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough; there must be proved an act D which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to E himself, it is not the act of another, or the same as that other's act. The result is that s. 34, construed thus, has no content and is useless. ...

He then outlined a hypothetical situation to illustrate his point:

F Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under s. 34. Really it is not.

G Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either H would be liable, is done by himself alone, is precisely not the act done by the other person.

There are two acts, for which both actors ought to suffer death, separately done by two persons but identically similar. Let us add the element, that neither act without the other I would have been fatal; so that the fatal effect was the

> cumulative result of the acts of both. Even this does not make either person do what the other person does: it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of s. 34. ...
>
> On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged its onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man.

And ended by saying:

> If s. 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether.
>
> If the appellant's argument were to be adopted, the Code, during its early years, before the words 'in furtherance of the common intention of all' were added to s. 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words express all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. ...
>
> *Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amending section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section.* (emphasis added.)

> *Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, 'a criminal act' means that unity of criminal behavior, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.* (emphasis added.)

We also found the remarks of Sir Madhavan Nair in *Mahbub Shah v. Emperor* AIR [1945] PC 118 at p 120 instructive:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

Barendra Kumar Ghosh and *Mahbub Shah* were approved and adopted by the Court of Criminal Appeal in *Wong Mimi & Anor v. PP* [1972-1974] SLR 73 and *PP v. Neoh Bean Chye & Anor* [1972-1974] SLR 213. The court disapproved of *Vincent Banka*, a decision of the Court of Criminal Appeal of the Straits Settlements and held that it was not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s. 34 to apply it was sufficient to prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention. In *Wong Mimi*'s case, Wee Chong Jin CJ who delivered the judgment of the court explained the effect of s. 34 of the Penal Code in the following terms at pp. 78-79:

> There is no doubt that for this section to apply there must be in existence a common intention between all the persons who committed the criminal act, and that a criminal act be done in furtherance of that common intention. When these

two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had done it alone. ...

It is clear from the Privy Council's (in *Barendra Kumar Ghosh*) interpretation of the words 'criminal act' that it is the result of a criminal act which is a criminal offence. It then remains, in any particular case, to find out the actual offence constituted by the 'criminal act'. If the nature of the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s. 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention. Thus if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying to s. 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of that common intention and as their 'criminal act', ie that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s. 302, A is also guilty of murder.

In *Wong Mimi*, the first appellant was convicted of the murder of one Mrs Watanabe (whose husband she was having an affair with). The second appellant, the first appellant's husband, was also convicted of murder under s. 302 read with s. 34 of the Penal Code. The facts were that when the first appellant went to the deceased's house, she brought with her a knife which she subsequently used to inflict the fatal injury. So far as the part played by the second appellant was concerned, the court accepted the findings of the trial judges (at p 77 of the report):

> ... that the idea of throwing the detergent came from him; that he brought the Glucolin tin containing the detergent; that he requested the first appellant to lure the deceased to the bathroom on the pretext of inspecting the broken wash basin; that he mixed water with the detergent; that he wrapped a towel round the Glucolin tin to prevent leaving finger prints on it; that he threw the detergent into the eyes of the deceased after he saw the first appellant had taken a knife and was ready to stab the deceased and that he was clearly a party to the stabbing of the deceased.

One of the arguments advanced on behalf of the second appellant was that s. 34 could only be applied if the common intention of the accused was to commit the offence with which they were charged. In other words, the second appellant could not be found guilty of an offence under s. 302 of the Penal Code unless the common intention of the appellants was to cause the death of the deceased, or was such other intention as is mentioned in s. 300 of the Code. The court had no difficulty in rejecting this argument and held that s. 34 had been properly applied *vis-à-vis* the second appellant. In Neoh Bean Chye, the first appellant knew that the second appellant had a loaded revolver and that it would be used, if necessary, during the course of the robbery. He himself had loaded the gun and handed it to the second appellant who shot the deceased when he offered resistance during the robbery. The first appellant's conviction for murder under s. 302 read with s. 34 of the Penal Code was upheld by the court.

On this view, all that it is necessary for the prosecution to prove is that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s. 34 of the Penal Code) was committed in furtherance of that criminal act. The rider to this is that the participants must have some knowledge that an act may be committed which is consistent with or would be in furtherance of, the common intention. Support for this approach may be found in the words of Desai J in *Bashir v. State of Allahabad* AIR [1953] All 668 at p 672:

> These words ('in furtherance of the common intention') were added by the legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons, acting in concert, liable for an act, which is not exactly the act intended by them, but has been done in furtherance of their common intention. The words would not have been required at all if the common intention implied an intention to do the very criminal act done.

It will be recalled that Lord Sumner had made the same point in *Barendra Kumar Ghosh*. Applying this test to Neoh Bean Chye, the offence for which the appellants were ultimately charged murder was done in furtherance of their common intention to commit a criminal act (robbery); they also knew that the victim might be shot if he offered any resistance. They were clearly guilty of an offence under s. 302 read with s. 34 of the Penal Code.

A note of caution must be sounded before we move on the second element of s. 34. Common intention means a prior meeting of the minds and must be distinguished from same or similar intention. In Mahbub Shah, the appellant and one Wali Shah were out shooting game when they heard shouts for help from one Ghulam Quasim Shah who was being attacked by the deceased, Alla Dad. (Ghulam had tried to get back from Alla Dad the reeds which the latter had unlawfully taken from the lands of Ghulam's uncle). Wali Shah in trying to rescue Ghulam shot and killed Alla Dad while the appellant injured one Hamidullah Khan. Both the appellant and Wali Shah were convicted under s. 302 read with s. 34. The Privy Council in allowing the appeal, said that while the appellant and Wali Shah had the same or similar intention to rescue Ghulam by using their guns if necessary, there was no evidence that the killing of Alla Dad was in furtherance of a common intention. Sir Madhavan Nair said at p 121 of the report:

> Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, *viz*, the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Alla Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their 'bounds' is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lorships' view, the inference of common intention within the meaning of the term in s. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

(2) 'In furtherance of the common intention of all'

The first point to be made here is that the 'criminal act' done by one of the accused must be 'in furtherance of the common intention of all'. However, as discussed above, this does not mean that there must be a common intention to commit the criminal act actually committed and for which the accused is ultimately charged. The learned authors Ratanlal and Dhirajlal, in their *Law of Crimes* (1997) at p 122 para 28 divide acts done in furtherance of the common intention into three categories. In the first category are those acts which are directly intended by all the confederates. In the second are acts which in the circumstances leave no doubt that they are to be taken as included in the common intention, although they are not directly intended by all the confederates. And in the third are acts which are committed by any of the confederates in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention. The third category of acts may cause difficulties as the individual doer in doing the act or acts may produce results or consequences not intended by the others.

The second and more important point is that the common intention must precede the criminal act: see, eg *Asogan Ramesh s/o Ramachandren & Ors v. PP* [1998] 1 SLR 286. In this contention, the question is whether or not there must be found a pre-arranged plan in determining whether the 'criminal act' was done 'in furtherance of the common intention'. In Mahbub Shah, the Privy Council held that common intention implies the existence of a pre-arranged plan. Sir Madhavan Nair said at p 120:

> ... it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

However, the difficulty of proving a pre-arranged plan was noted by Baguley J in the Rangoon case of *Nga Aung Thein & Anor* AIR [1955] Ran 89 (FB) 90. He did not think it was an essential precondition:

> It seems that the condition precedent suggested in the question, namely, a pre-arranged intention to commit murder, a pre-arrangement which from the nature of things in the vast majority of cases it would be absolutely impossible to prove, is not essential ... .

Indeed, the requirement of a pre-arranged plan, if it can be so called, has been qualified to a large extent. In Bashir, the court clarified Sir Madhavan Nair's statement in *Mahbub Shah* at p 671 as follows:

> In *Mahbub Shah* 'common intention' was held to imply a 'pre-arranged plan'. This does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act. The Judicial Committee in the case of *Mahbub Shah*, did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act.

See also *Krishna Govind Patil v. State of Maharashtra* [1963] 2 Cri LJ 351 at p 352 and *Namasiyiam & Ors v. PP* [1987] 2 MLJ 336 at pp 344-345 to the same effect. Thus pre-arrangement need not exist in the sense of a prior plan. The plan could develop on the spot. What is required, however, is a meeting of the minds or acting in concert. Since it would in most cases be virtually impossible to prove a pre-arranged plan, failure to do so is of no consequence. Instead, 'common intention' is to be inferred from all the facts and circumstances of the case, including the conduct of the accused. Thus in *Nga Aung Thein*, in the context of robbery and murder, Baguley J said that

> ... it is sufficient if the court is of opinion that from all the facts proved, the way in which the robbery was carried out, the weapons with which the robbers were armed, ... the characters of the robbers themselves, and so on, a legitimate inference can be drawn that the robbers went out to commit robbery and, if necessary, to kill, and that death resulted in consequence of what they as a band did.

Similarly, the same sort of considerations applied in *Wong Mimi*. The throwing of the detergent in the deceased's eyes at the critical moment when the first appellant was about to stab her was to prevent any resistance on her part, and certainly showed some

A strategy on the part of the second appellant which was not inconsistent with the killing. However, Desai J in *Bashir* warned that:

> common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it, these two are independent facts and one is not to be assumed or inferred exclusively from the other. ...

Therefore all the facts and surrounding circumstances must be taken into consideration.

(3) Participation in the criminal act

Section 34 requires the criminal act to be 'done by several persons'. There must be physical presence at the site of the actual commission of the offence in question coupled with actual participation, whether active or passive: *PP v. Gerardine Andrew* [1998] 3 SLR 736 and *Too Yin Sheong v. PP* [1999] 1 SLR 682. Regarding passive participation, the comment of Lord Sumner in Barendra Kumar Ghosh at p 6 of the report that 'in crimes as in other things they also serve who only stand and wait', *albeit* merely *obiter*, is noteworthy.

In *Om Prakash v. State* AIR [1956] All 241, it was held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. The court cited as an example a person who is present at the spot as an eye-witness to the offence, this was to be contrasted with a person who is present as a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime, whereas the latter is guilty because he is present for the purpose of seeing that the crime is committed. The following observations of Mookerjee J in *Barendra Kumar Ghosh* AIR [1924] Cal 257 were held relevant:

> It is the expectation of aid, in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence.
>
> It is therefore sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for fulfilment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise.

In this context, the words 'criminal act' in s. 34 are to be taken in the broadest possible sense, as s. 33 states that an act includes a series of acts. Beg J in Om Prakash stated that the words would cover any word, gesture, deed or conduct of any kind on the part of a person, whether active or passive, which tends to support the common design.

[66] The Privy Council in *Mahbub Shah v. Emperor* AIR [1945] PC 118 considered the term "common intention" as distinguished from "same intention". If the person, party to prior planning is not present to participate in the action, his case cannot be covered under s. 34 of the Penal Code. In *Sereekanlal Ramayya Munipalli v. State of Bombay* AIR [1955] SC 287, the Supreme Court stated:

> Lord Sumner's expressed in the Miltonic verse: "They also serve who only stand and wait" a *fortiori* embraces cases of common intention, instantly formed triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile needs, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or cooperation. No pinery justice niceties can be pressed into service to nullify or jettison the plain punitive purpose of Penal Code.

[67] After having given consideration to the elucidatory interpretation given to the words in s. 34 we are in agreement with the determination pointedly made by the COA where it is pronounced that:

> On the facts and circumstances of the present case, we are satisfied as indeed the learned trial judge was that the 1st and 4th accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred

A from the injuries inflicted on the deceased coupled with their flight from the scene reasonably support the existence of a common intention. We are conscious that there authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases you will find
B that in each of them flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime.

[68] In the instant appeal that HC judge ruled that the evidence
C adduced by the prosecution led to the inference that the appellants were in the house. HC also accepted the evidence of SP17, SP18, SP23 and the unchallenged findings on the DNA. However, on the issue of common intention and intention pursuant to s. 300 his own inferences on what could not have been the intention of the
D appellants were not found in the evidence.

[69] The conclusion is as stated in the grounds of judgment of the COA that at the close of the whole case before the High Court, all the ingredients of an offence under s. 302 were established.
E There was indeed a misdirection on facts and upon the law when the trial judge held that a lesser offence was instead committed. This warrants appellate intervention and as we have stated above, we have found that the COA has shown justification for appellate intervention.

F **[70]** The convictions and sentences imposed by the COA on both appellants are therefore upheld and their appeals accordingly dismissed.

G

H

I